THE JOURNAL OF LIBERTARIAN STUDIES

AN INTERDISCIPLINARY QUARTERLY REVIEW

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CONSENT, SEX, AND THE PRENATAL RAPIST

A BRIEF REPLY TO MCDONAGH'S SUGGESTED REVISION OF *ROE V. WADE*

Francis J. Beckwith* and Steven D. Thomas**

The abortion debate is often understood to hinge on the question of whether or not the fetus[1] is a full-fledged member of the moral community of persons and/or possesses a property or properties that make it the sort of being that it is prima facie wrong to kill. This is the position taken by Justice Harry A. Blackmun in *Roe v. Wade*[2] as well as

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We would like to thank Scott Klusendorf, Director of Bioethics, Stand to Reason, and an anonymous referee for their thoughtful comments and analysis that helped us to sharpen our arguments and make this a better article. We take full responsibility for all of its shortcomings.

[1]We use the term "fetus" in the popular sense as synonymous with "unborn." We are not using it in the technical sense of referring to the last stage in prenatal development after zygote and embryo. Thus, we are using the word fetus to refer to the unborn entity at all stages of its development prior to birth.

[2]Blackmun writes: "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus's right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. [1973] 113, 157–58.

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partisans on all sides of the debate.[3] However, over the years, legal and constitutional theorists such as Judith Jarvis Thomson have put forth arguments by which they attempt to make the case that what is doing the moral work in the question of abortion is not fetal personhood but rather the bodily autonomy of the pregnant woman.[4]

Eileen L. McDonagh, in a provocative and sophisticated defense of this perspective, building on Thomson's work, proposes that we view pregnancy as an assault on the pregnant woman's body:

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[3]See, for example, Mary Ann Warren, "On the Moral and Legal Status of Abortion," in *Do the Right Thing: Readings in Applied Ethics and Social Philosophy*, 2nd ed., ed. Francis J. Beckwith (Belmont, Calif.: Wadsworth, 2002); Louis P. Pojman, "Abortion: A Defense of the Personhood Argument," in *The Abortion Controversy 25 Years After Roe v. Wade: A Reader*, 2nd ed., ed. Louis P. Pojman and Francis J. Beckwith (Belmont, Calif: Wadsworth, 1998); Michael Tooley, "In Defense of Abortion and Infanticide," in *The Abortion Controversy 25 Years After Roe v. Wade*; Francis J. Beckwith, *Politically Correct Death: Answer the Arguments for Abortion Rights* (Grand Rapids, Mich.: Baker, 1993); Baruch Brody, *Abortion and the Sanctity of Human Life* (Cambridge, Mass.: M.I.T. Press, 1975); Stephen Schwarz, *The Moral Question of Abortion* (Chicago: Loyola University Press, 1990); L.W. Sumner, *Abortion and Moral Theory* (Princeton, N.J.: Princeton University Press, 1980); and Don Marquis, "Why Abortion is Immoral," *Journal of Philosophy* 86 (April 1989).

[4]Judith Jarvis Thomson, "In Defense of Abortion," *Philosophy and Public Affairs* 1, no. 1 (1971). See also Donald Regan, "Rewriting *Roe v. Wade*," *Michigan Law Review* 77 (1979); Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: W.W. Norton, 1990), chap. 6; Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Belief* (New York: HarperCollins, 1993), pp. 257–58; David Boonin-Vail, "A Defense of 'A Defense of Abortion': On the Responsibility Objection to Thomson's Argument," *Ethics* 107, no. 2 (January 1997); and David Boonin-Vail, "Death Comes to the Violinist," *Social Theory and Practice* 23, no. 3 (Fall 1997).

Responses to Thomson's argument are plentiful, including Francis J. Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," *International Philosophical Quarterly* 32 (1992); Patrick Lee, *Abortion and Unborn Human Life* (Washington, D.C.: Catholic University of America Press, 1996), chap. 4; Keith Pavlischek, "Abortion Logic and Paternal Responsibilities: One More Look at Judith Thomson's Argument and a Critique of David Boonin-Vail's Defense of It," in *The Abortion Controversy 25 Years After Roe v. Wade*; and John T. Wilcox, "Nature as Demonic in Thomson's Defense of Abortion," *The New Scholasticism* 63 (Autumn 1989).

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> Even in a medically normal pregnancy, the fetus massively intrudes on a woman's body and expropriates her liberty. If a woman does not consent to this transformation and use of her body, the fetus's imposition constitutes injuries sufficient to justify the use of deadly force to stop it. While it is not usual to think of pregnancy as an injury, that is exactly how the law already defines it when it is imposed on a woman without her consent. For example, when men or physicians expose women to the risk of pregnancy by means of rape or incompetent sterilization, and a pregnancy follows, the law clearly establishes that women have been seriously injured. The term the law uses for such a coerced pregnancy is wrongful pregnancy, and the law holds the perpetrators responsible for the injuries entailed by it. This book expands the concept of wrongful pregnancy to include what the fertilized ovum does to a woman when it makes her pregnant without her consent. It is the only entity that can make a woman pregnant, and when it does so without her consent, it imposes the serious injuries of wrongful pregnancy even if the pregnancy in question is medically normal. . . . [T]o the extent that the law protects the fetus as human life, the law must hold the fetus accountable for what it does.[5]

McDonagh is arguing that just as a woman may use lethal force to defend herself against a rapist (a person seeking to invade her body without her consent), this same woman may use lethal force to defend herself against a fetus (a person who has invaded her body without her consent). In fact, throughout her book, McDonagh repeatedly draws an analogy between nonconsensual sex (i.e., rape) and unwanted pregnancy, maintaining that the latter is morally indistinguishable from the former. So McDonagh, like Thomson, grants to abortion opponents the truth of their most important premise—the fetus is a human person—then argues that the premise is irrelevant since the anti-abortionist's biconditional premise—abortion is *prima facie* unjustified homicide if and only if the fetus is a human person—is mistaken. McDonagh suggests, by employing the jurisprudential logic of her case, that the

> policy inadequacies stemming from the *Roe* foundation for abortion rights can be corrected by restructuring the constitutional right to an abortion on an equal protection

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[5]Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996), p. 7.

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> foundation evoking a woman's right to consent-to-pregnancy rather than merely her right to choose an abortion.[6]

There are many ways that one may respond to McDonagh's argument, although in this brief essay we will raise two philosophical objections. First, we will argue by counterexample that explicit consent to pregnancy (or the lack thereof) is not sufficient for deciding the morality of an abortion. We hope to show that McDonagh's thesis, rather than justifying an abortion, can be employed to illustrate that pregnancy, unlike rape, is not a prima facie harm. At the very least, her position can be shown to be incompatible with, and even undermining to, what we believe are the moral intuitions behind the pro-choice position both popularly understood as well as upheld by the U.S. Supreme Court.

Second, we will argue that the rhetorical strength of McDonagh's case for her claim that consent-to-sex does not entail consent-to-pregnancy relies on moral intuitions that depend largely on a disputed philosophical anthropology.

Two Counterexamples

Consider the following scenario. A young woman is involved in a car accident and is rendered unconscious by her injuries. She is brought to a hospital where, still comatose, she is examined by a doctor. While performing some tests, the doctor determines that the woman has been pregnant for several weeks. Furthermore, suppose that evidence comes to light to suggest that the woman is unaware of her pregnancy—perhaps her close friends know nothing of the pregnancy, her diary shows no knowledge of being pregnant, and so on.[7]

Adopting McDonagh's understanding of pregnancy as morally equivalent to rape or assault, what is the doctor's obligation to this unconscious patient? It would seem that, under these conditions, the doctor is morally required to perform an abortion to rid his patient of the "massive intrusion" being imposed upon her by her unborn offspring. After regaining consciousness, the woman would have to be

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[6]Eileen L. McDonagh, "My Body, My Consent: Securing the Constitutional Right to Abortion Funding," *Albany Law Review* 62 (1999), pp. 1059–60.

[7]For purposes of the thought experiment, we assume that she had no knowledge of the pregnancy while she was unconscious. Our conclusions, however, will only require that the physician have good reason to believe that the woman is unaware of her pregnancy.

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told that she's undergone an abortion for a pregnancy of which she was not aware, for there was good evidence that no consent had been given and that she was under assault.

We submit that this conclusion, logically drawn, is grossly incompatible with our moral intuitions concerning pregnancy. It is hard to imagine that any doctor, in good conscience, would perform an abortion on this woman merely because he had no evidence that she had consented to the pregnancy. It is likely that those undergoing such an abortion would experience a tragic sense of loss; a sense of having been robbed of something precious in the pregnancy, something which, at the very least, deserved thoughtful consideration despite the difficulties of bearing a child. It is hard to imagine that a woman in such circumstances would not herself feel significantly violated. In other words, contra McDonagh, the abortion, not the pregnancy, would be more analogous to rape.

An anonymous referee suggests that "perhaps most recent" or ongoing consent may be an effective reply against our arguments. He writes:

> In the accident victim case, what matters is not whether the now-unconscious woman consented to pregnancy at the time of the conception, but whether she would consent to pregnancy now. If she would, then the doctor is not justified in proceeding with the abortion.

This reply may be consistent with the traditional pro-choice position, as we believe that it is, but it seems to miss the parallel between rape and pregnancy that McDonagh is trying to draw.

McDonagh's position compares pregnancy without consent to sex without consent, i.e., rape, a very serious charge. So to take McDonagh at her word, we identify a situation in which pregnancy occurs without consent in an unconscious patient; we then press the parallel: a man could be having sex with that same unconscious patient. In this light, it is hard to see how someone could dismiss the accident counterexample with the claim that what matters is whether the pregnant woman would consent to pregnancy now. To press the parallel, what matters is whether she would consent to sex now. Would anyone really allow a man to have sex with an unconscious woman? If not, though one would allow the pregnancy to continue, then this is evidence that McDonagh's parallel is ill-formed, which is precisely our point.

A traditional pro-choice advocate, sympathetic to the difficulties of this case, might respond to our accident-victim story by saying that the doctor should wait until his patient regains consciousness. To the

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contrary, McDonagh reinforces the unfortunate conclusion we have drawn from the logic of her position:

> Some might suggest that the solution to coercive pregnancy is simply for the woman to wait until the fetus is born, at which point its coercive imposition of pregnancy will cease. This type of reasoning is akin to suggesting that a woman being raped should wait until the rape is over rather than stopping the rapist. Nonconsensual pregnancy, like nonconsensual sexual intercourse, is a condition that must be stopped immediately because both processes severely violate one's bodily integrity and liberty.[8]

Under McDonagh's thesis, the doctor in the midst of the situation, aware of the pregnancy in the absence of consent, must see it as the rape-in-progress of his unconscious patient. How could he do anything else but end the assault?

Someone may object to our use of the McDonagh quote by which we attempt to show that she would agree to performing an abortion on the unconscious woman. The objector may argue that the analogy we implicitly draw between waiting until the woman wakes up and waiting until the pregnancy comes to term seems forced. Such an objector might argue that the point of waiting until the woman wakes up is to see whether the pregnancy is voluntary, a reason that does not exist in the other case. But clearly in the analogy given above, where both women are unconscious during pregnancy or sex respectively, this reason exists in both cases. Therefore, this objection fails, for it relies on pro-choice intuitions, but those intuitions are contrary to McDonagh's argument.

Consider another counterexample to McDonagh's case. Imagine if a woman were raped by her husband's identical twin brother within five hours after having unprotected sex with her husband. Suppose that she and her husband engaged in sex for the express purpose of procreating a child. A month later she discovers that she is pregnant, but she does not know, and cannot know, if the child's father is her husband or the rapist. Would she be justified in having the abortion? Apparently not, according to McDonagh, for there would be a 50/50 chance that she would be killing an innocent person, someone whom

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[8]McDonagh, *From Choice to Consent*, pp. 11–12. Remember that coercive pregnancy, for McDonagh, is caused by the zygote's own implantation, and thus is not the result of rape or incompetent sterilization. It is wholly the "fault" of the fetus.

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she consented to let live in her body. Yet, most pro-choice advocates would say that such an abortion would be justified because the fetus is not a person whether or not its father is the rapist.

Imagine that the police are able to identify the woman's rapist with only one piece of evidence: his DNA matches the DNA of the genetic material found on her person. The police subsequently arrest him, and he is convicted and given the death penalty. Suppose, however, that it is discovered several months later that the rapist and the husband are in fact two of three identical triplets, all of whom obviously have the same DNA. Assuming that the husband has been conclusively ruled out as the rapist, there is a 50/50 chance that the man on death row is the rapist. Would the state be justified in executing this man? Surely not, for there is a 50/50 chance of executing an innocent person. Consequently, if it is wrong to kill the man on death row, then it is wrong to kill the fetus without knowing whether it is truly the invited guest.

In reply to this counterexample, an anonymous referee writes:

> In the raped wife case, even if the fetus is her husband's and so was consented to at the time of conception, if the wife—on the grounds of her uncertainty as to whether the fetus is her husband's or the rapist's—withdraws her consent *now* to the pregnancy, she can seek an abortion.

This reply seems to misconstrue the analogy. Remember that the wife consented not merely to conceive a particular child, but to bring to term a particular child, a rights-bearing human being who is the desired fruit of a consensual union with her husband. He is not a "rapist," for he was an invited guest by both parties whose commingling resulted in his coming into being.

The death penalty, according to our laws and the moral principles we employ to justify them, is a punishment that can only be inflicted after a criminal defendant is allowed due process. If, for example, we were to discover, as in the above story, that there is a strong possibility that a convicted rapist about to be executed is innocent because of evidence not presented at trial, the state would not be justified in executing him, for the new evidence demands that there is still process due him. The convicted rapist is a *particular* individual who may or may not be guilty. Executing *him* without a new trial would be unjust, even if we found out after the execution that the state executed the guilty triplet.

In the same way, the child carried in the pregnant woman's womb may or may not be the invited guest. That uncertainty, rather than

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justifying the abortion, requires abstaining from it, for appealing to the uncertainty of the unborn's identity as justification means that the pregnant woman would *not* have the abortion if she *knew* that the child was her husband's, just as the state would not execute the convicted rapist if it discovered that it was actually his triplet who committed the crime. When one's justification for acting is absent (i.e., the fetus is the rapist's child), then one is not justified in acting.

Because McDonagh concedes the full personhood of the unborn, withdrawing consent *now*, as the referee suggests, is not a real option,[9] for that fetus is a full-fledged member of the human community, no different in nature or rights than the woman that carriers her and the father who sired her. So, like the convicted rapist who may be her father, the fetus is entitled to due process.

If, however, McDonagh were to say in reply that the pregnant woman may withdraw her consent at any time even if she knows conclusively that the child is her husband's because bodily autonomy trumps all promises and the obligations entailed by them, then McDonagh's view reduces to an assertion of mere willfulness and nothing more. A consent that can be withdrawn at any time for any reason or for no reason—even if it results in the death of a mentally immature, rights-bearing, human being that one intentionally brought into existence and invited to be placed in a vulnerable position—is no "consent" at all. It is a will to power.

In the above two counterexamples, a consent-basis for deciding the morality of an abortion is clearly in opposition to the traditional pro-choice position as it is presented in the public square:

> A woman has the right to decide for herself when and whether to have a child. It means believing that women are moral decision-makers. It means believing that women can decide on their own, based on their personal beliefs,

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[9]Of course, there could be countervailing reasons for justifying an abortion in a given case, even if one were to embrace a traditional pro-life position. For example, one could argue that when a continued pregnancy endangers a woman's life, then pregnancy termination is justified. But not because the fetus is not a person, and not because a woman has absolute autonomy over her body, but rather, because if the pregnancy continues it is likely that both will die, and since it is better than one should perish rather than two, morality justifies pregnancy termination. The intent is not to kill a human being, but rather, to save a life by a means that has the foreseeable side affect of killing another human being.

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> health, and life circumstances, without government interference. And it means working toward a world where all women's reproductive options—whether it's motherhood, abortion, or adoption—are legal, safe, and accessible.[10]

McDonagh paints such a harsh picture of pregnancy, both biologically and morally, that compulsory abortion is demanded whenever the requirements for consent are not met (counterexample #1). On the other hand, McDonagh's concession of fetal personhood requires her to place so much emphasis on consent that her view may require carrying a pregnancy to term, even when traditional pro-choice philosophy would not (counterexample #2). The woman in either of the above scenarios could not be treated with pro-choice convictions; instead, she would be removed from the decision-making process for her own good. She could not decide on her own, based on her personal beliefs, health, and life circumstances, without interference. Instead, someone would decide for her, on the grounds that the prima facie harm of pregnancy (counterexample #1) or the sufficiency of consent (counterexample #2) requires interference in what the United States Supreme Court has called a matter involving one of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment."[11] In light of this, it is remarkable that McDonagh's work has been the subject of so much fanfare in pro-choice circles.[12]

Contra McDonagh, in the traditional pro-choice position there is a strong suggestion implicit that pregnancy is either a possible or prima facie moral good for the woman, one that may overshadow related difficulties, at least in a medically normal pregnancy. Pregnancy is significantly worthwhile at least to the extent that it demands the opportunity for serious moral decision-making. And this stands as a marked difference to McDonagh's analogies to rape, assault, or other bodily violations. After all, it is hard to believe that rape *could be* a moral good, whereas one can easily embrace a pro-choice position while maintaining that pregnancy is either a possible or *prima facie* moral

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[10]Planned Parenthood, *Pro-Choice Debate Handbook*, www.planned parenthood.org/politicalarena/Pro-Choice_Debate_Handbook.html, (9/29/99).

[11]*Planned Parenthood v. Casey*, 505 U.S., 833, 851 (1992).

[12]See the online transcript of "NOW Reframing Abortion Rights Briefing on 'Breaking the Abortion Deadlock, From Choice to Consent'," January 21, 1997, www.now.org.

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good that could be trumped by other considerations (e.g., the rape in counterexample #2). Thus, from a traditional pro-choice perspective, pregnancy is a good that is minimally worthy of knowledge and the freedom to pursue that knowledge, that is, it demands recognition and reflection. A pregnancy in progress, despite its burdens upon the mother, invokes a deep understanding that something is happening that is or could be wonderful, that it is clearly not a prima facie harm and clearly not analogous to the evils of rape, assault, coercion, and the "expropriation of liberty."

CONSENT-TO-SEX AND CONSENT-TO-PREGNANCY

McDonagh makes a distinction between consent-to-pregnancy and consent-to-sex. The latter, in her judgment, does not entail the former, for if consent-to-sex entails consent-to-pregnancy, then there would be a tacit moral obligation on the part of the pregnant woman to care for, or at least not kill, the fetus. If this is the case, the best defense of abortion rights is to argue for the non-personhood of the fetus, something for which McDonagh does not want to argue. If the fetus is a not a person, then pregnancy does not entail the existence of a human person but merely the existence of a potential person. McDonagh, however, grants fetal personhood, and maintains that when pregnancy commences, a new human person has come into existence who did not exist prior to that moment. In order to justify the killing of this human person, then, McDonagh must argue that there is no tacit consent to caring for, or at least not killing, the child because consent-to-sex does not entail consent-to-pregnancy.

In order to make her case, McDonagh uses a number of analogies to make the point that we do not consent to an injury (e.g., pregnancy) even if we know that our actions (e.g., sex) negligently increase our risk of injury. To cite some examples: consenting to smoking cigarettes, living in an area known for hurricanes, or wandering into a forest occupied by grizzly bears does not mean that one is consenting to lung cancer, destruction to one's property, or becoming a meal. Analogously, consenting to sex does not mean that one is consenting to pregnancy.

We will raise only one objection here, even though one could marshal a number of criticisms of McDonagh's analogies on moral,[13]

[13]See, for example, Beckwith, "Personal Bodily Rights"; Lee, *Abortion and Unborn Human Life*, chap. 4; Pavlischek, "Abortion Logic and Paternal Responsibilities"; Wilcox, "Nature as Demonic in Thomson's Defense of Abortion"; and an essay sympathetic to, though critical of, McDonagh's

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philosophical, and legal[14] grounds, including counter-analogies that appeal to intuitions that are consistent with an anti-abortion position. It seems to us that McDonagh's analogies "work" only because they presuppose a controversial philosophical anthropology that many reasonable people would find prima facie mistaken. If one can show that McDonagh's philosophical anthropology is controversial, then the moral intuitions that are grounded in it and to which she appeals in order to make her case are not prima facie correct. Let us explain.

Although McDonagh separates sex and pregnancy in her analysis, it is not clear to everyone that they are detachable-though-causally-related events, like wandering into a forest and being attacked by a grizzly bear. It seems reasonable to many people that sex is really part of pregnancy, since it is the act engaged in by agents from which pregnancy is the designed (though maybe not the desired) result. This is not the same as the way that lung cancer results from cigarette smoking. If one thinks of the human organism as a unified substance with certain natural purposes, then it seems correct to say that the *telos* (or purpose) of reproductive organs *is* reproduction (i.e., pregnancy), for sperm and ova seem designed for that very purpose. On the other hand, a cigarette is an artificial construct whose purpose is externally imposed upon it by an outside agent, its manufacturer. A cigarette is not a living organism, a unified substance, whose parts work together for a certain purpose because of its internal nature or essence. J.P. Moreland clarifies this notion when he writes that:

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perspective, Robin West, "Liberalism and Abortion," *Georgetown Law Journal* 87 (June 1999).

[14]For example, according to the prima facie case for negligence, one is liable for negligence if one (1) has a duty, (2) breached a duty, and (3) caused harm as a result of breaching the duty. One could argue against McDonagh in the following way: Since pregnancy is a foreseeable result of unprotected sex, and since for McDonagh a fetus is a human person, therefore, one who engages in sex has a duty to engage in due care so as not to bring into existence persons whose death due to abortion is foreseeable. There are a number of tort principles one could apply. For example, one could apply the Hand Formula —one is negligent when one does not act to prevent injury to another when the burden of prevention is less than the expected cost of the injury (*United States v. Carroll Towing Co.*, 159 F.2d 169 [2nd Cir. 1947])—or the responsibilities of a possessor of land for safety of trespasser, licensee, and invitee. See, generally, James A. Henderson, Jr., Richard N. Pearson, and John A. Siliciano, *The Torts Process*, 5th ed. (New York: Aspen Publishers, 1999), pp. 163–435.

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> It is because an entity has an essence and falls within a natural kind that it can possess a unity of dispositions, capacities, parts, and properties at a given time and can maintain identity through change. . . . [Moreover,] it is the natural kind that determines what kinds of activities are appropriate and natural for that entity.[15]

Thus, to understand one's self and one's nature is to understand that one's sexual organs are designed for procreation. Once one understands and appreciates that, it seems that consent to sexual intercourse *does* entail consent to pregnancy whether or not one intends or desires such a state. Given this philosophical anthropology, and given McDonagh's concession that the fetus is a human person, one may look at McDonagh's case in another, less morally compelling, way: She maintains that it is permissible to engage in a pleasurable act whose design is to bring into existence a vulnerable, defenseless, and dependent human person, and if such a person comes into existence, one of the persons responsible for its existence and who is in a unique position to care and nurture it, can then destroy it without any justification except an act of will.

To put it another way, the mother, by virtue of the sexual act's reproductive purpose, consents to a process in which she plays a vital procreative, protective, and life-supportive role in relation to her unborn child—one that only she can fulfill. She has agreed to this knowing that doing so may put her child (a rights-bearing individual) in a vulnerable state of which he or she cannot opt out. "Withdrawing consent" only after a child comes to be and enters this vulnerable state from which he or she cannot escape would be unconscionable, for there was no child (and therefore no harm which could come to the child) at the time of consent, and it is only after another's existence and vulnerable state is realized that consent is withdrawn. This is like agreeing to take care of a neighbor's infant for the weekend, only to abandon her prior to her parents' return.

We could employ McDonagh's own comparison of a fetus to a mentally incompetent individual[16]—a comparison she uses to secure

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[15]J.P. Moreland, "James Rachels and the Active Euthanasia Debate," *Journal of the Evangelical Theological Society* 31 (March 1988), p. 86.

[16]McDonagh comments: "From the standpoint of the law, it is not necessary that you intend to harm in order for it to be recognized that you are causing harm. For example, some people who are born are legally viewed as being mentally incompetent because they are under the influence of drugs, or they

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her claim to self-defense even when an assailant (i.e., the mentally ill individual or a fetus) is not responsible for his/her actions—to show a similar difficulty. Imagine inviting a mentally ill individual into a room with yourself, locking the door, and having prior knowledge that the individual *would* (without exception), under such conditions, make an attempt on your life.[17] Then, after defending yourself with lethal force, could you claim justifiable self-defense? If not, then neither can McDonagh claim that abortion is justified if either (a) consent to providing shelter and sustenance to the preborn entity is simultaneous with sex (pregnancy being a motivator for the sexual act, as in counterexample #2), or (b) consent to providing shelter and sustenance to the preborn entity is implicit in sex, consistent with a teleological view of human sexuality.

McDonagh may want to reject this alternate philosophical anthropology, and maintain that the human being is merely a collection of parts, a property-thing, like a car, computer, or cigarette, with no nature, essence, or natural purposes, that there are literally no such things as "reproductive organs" as such. But it is not clear how McDonagh can do so, given her reliance on notions such as "rights," which she seems to believe are essential moral properties that human beings (especially pregnant women) have prior to government (that is, by nature). This seems to imply that when human beings are denied their rights by government, they are not being treated in a way that is in accordance with their natural purpose (i.e., human beings are beings such that they have rights that ought to be respected by the state).

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are insane or they are mentally retarded, or for some other reason. And although mentally incompetent born people would be viewed as legally innocent of causing harm, because they do not have the ability to have intentions or control of their behavior, that does not mean they do not actually have great power to cause harm to others. So, if a born person who is incompetent were to attack you, we would all agree that such a person is innocent of any intentions of hurting you, yet such a person would still be able to hurt you a great deal, and the law would try to stop a mentally incompetent born person from hurting you, even though such a person intends no harm. The analogy with preborn life would be similar." See "NOW Reframing Abortion Rights."

[17]Not that we agree with McDonagh's illustration, for this too misconstrues the nature of pregnancy, in our opinion. The point is that even with McDonagh's position fully in play, the result is that an abortion under these conditions is unacceptable, morally and legally.

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McDonagh may respond by saying that human beings do have a natural purpose but only when it comes to rights and not when it comes to sex and pregnancy. She may *say* that, but it is unclear how she can have it both ways philosophically, once she grants teleology as an appropriate category by which to reflect on the nature of human persons. Once teleology is allowed in, it is difficult to deny that sex as part of pregnancy seems prima facie correct. Even if one were to deny the metaphysical foundation that some believe grounds sex as part of pregnancy, one would have to admit that the belief that sex is part of pregnancy is *at least* as well grounded a moral intuition as McDonagh's analogy that a physically dependent human person (the fetus) is like a cancer, hurricane, or hungry grizzly bear.[18]

Conclusion

McDonagh takes a drastically one-dimensional view of pregnancy, exploiting its hardships to the point of implicitly advocating compulsory abortion. Her reliance upon consent may also, under certain circumstances, require carrying a pregnancy to term—what some pro-choice advocates would term "compulsory pregnancy." In so doing, McDonagh has provided for us a medium by which to discover the possible or prima facie good inherent in pregnancy, a good that cannot be reduced to mere consent. In addition, to ground her separation of consent-to-sex and consent-to-pregnancy, McDonagh relies on moral intuitions which depend on a disputed philosophical anthropology over which many reasonable people disagree.

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[18]One may raise, as one referee has, several objections to our suggested alternative to McDonagh's teleology (or dysteleology) of human sexuality. We do not dispute that there are difficult questions that this viewpoint's proponents must address, but that misses the point of our analysis. All we are trying to do is to show that McDonagh does not a have a prima facie case, which means that our burden is minimal. In order to meet this burden, we merely have to show that it is reasonable (*not* rationally required) to believe a view that maintains that procreation is part of the purpose of sexual intercourse. We believe we have done that.

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MODELING HYPOTHETICAL CONSENT

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Arguments based on hypothetical consent are widely used in legal, political, and moral philosophy. The notion of hypothetical consent has been important to political philosophy at least from the 17th century, when the first classical forms of contractarian political theories were formulated. In bioethics, especially in literature concerning medical paternalism, arguments based on hypothetical consent have drawn much attention. In recent years, these arguments have become popular in legal theory as well. In fact, one finds these arguments not only in law review articles but in actual court opinions.[1]

Although the notion of hypothetical consent is central to many contractarian arguments, it is highly ambiguous. Hypothetical consent is often characterized merely by saying that it is what someone "would have wanted" or "would have consented to." However, this kind of characterization is open to several different interpretations, not all of which have any moral force. Before we can plausibly use hypothetical consent-based justification, we should have a clear understanding of what it actually means when someone has hypothetically consented to something and why it is supposed to have moral force.

I begin by exploring how hypothetical consent differs from various forms of actual consent, and from where actual consent derives its moral force. After all, our intuition behind the arguments from hypothetical consent is often that hypothetical consent is sufficiently similar to actual consent to have a similar kind of moral force.

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[1]The proponents of economic analysis of law in particular have surprisingly often based their arguments on the notion of hypothetical consent. See, e.g., Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1992), p. 93.

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Actual Consent vs. Hypothetical Consent

Consenting is a way of committing ourselves. By giving our consent, we are putting ourselves under moral duty to accept something. The normative force of consent is derived from the moral significance of autonomy. Competent persons have the right to direct their own lives, and by giving their consent, they are using this right. Consent has binding moral force because it promotes individual autonomy, which is valuable in itself. An argument from consent can be formulated as follows:

AC: *S* has consented to *x*; therefore, *S* is obliged to accept *x*.

The argument says that if I have given my consent to something, then I have a moral duty to accept it. By giving one's consent, one puts oneself under an obligation. AC does not say that if someone has given consent to something, it is *morally permissible* to do it. For example, it is not morally permission for someone to kill me just because you have consented.

AC seems to suggest that every act of consent creates an obligation for the one who consents. However, only certain types of consent have moral relevance. It is one thing to ask which acts count as consent, and another to ask which acts of consent have moral force. In fact, the basic problem of all political, legal, and moral theories which employ consent-based justifications is how to distinguish the acts of consent which have some moral force from those which have none. To distinguish between these two, we need to introduce a notion of *valid consent*. Valid consent is an act of consent which creates a moral obligation. We can, thus, reformulate the argument from consent into the argument from valid consent:

AVC: *S* has given valid consent to *x*;
therefore, *S* is obliged to accept *x*.

Valid consent requires the autonomy of the agent, since only the autonomously given consent has moral force. For example, if I give all my money to a mugger who is holding a gun to my head, I am not obliged to accept that he takes all my money, although I am certainly giving my consent to that. Consent under this kind of coercion is not given autonomously, and therefore it is not valid.

Consent has to be given intentionally and voluntarily, but to be valid, it also needs to be autonomous. Consent is autonomous only if it is given under the absence of external control. According to this interpretation, not all voluntary acts are autonomous. Autonomy presupposes freedom, but freedom does not presuppose autonomy.

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It is important to note that consent-based justification does not derive its moral force from the content of consent. Consent has a moral force independent of the wisdom of choice. Valid consent derives its moral force from the competent persons' right to direct their own lives. Because you have a right to direct your own life, I am not allowed to do certain things to you without your valid consent.

One may give actual consent in several different ways. One can do this, for example, by giving a promise or by accepting an offer, but consent need *not* be a verbal act. If I read a book, I give my consent to reading that book; if I go to a strip bar, I give my consent to seeing naked girls.

Hypothetical consent must be kept separate from these different forms of actual consent. By definition, hypothetical consent is not real consent at all: it is only *hypothetical*.[2] A common mistake is to confuse hypothetical consent with implicit or tacit consent.

Tacit and implicit consent are sometimes used as synonyms. However, we should make a distinction between these two forms of consent. Implicit and tacit consent are both *unstated*, but in a different sense. The basic difference between these two forms of unstated consent may be illuminated by the following examples.

First, suppose that a lecturer says to the audience: "Is it okay with everyone that we meet tomorrow one hour earlier than normally?" If the answer is silence, then we say that the audience has given its tacit consent to the lecturer's proposal. Tacit consent is given by being quiet; it is an omission, not an act.

Second, consider the following statement of consent: "You may play my piano while I am on holiday." In this statement, I *explicitly* consent to you playing my piano while I am on holiday, but this is the *only* thing I *explicitly* consent to. However, for you to play my piano, you must be able and allowed to come into my house. When I *explicitly* give you consent to play my piano while I am on holiday, I am, by this very same statement, *implicitly* accepting that you come into

[2]In a similar manner, Dworkin has written that: "A hypothetical contract is not simply a pale form of contract; it is no contract at all." Ronald Dworkin, "The Original Position," in *Reading Rawls*, ed. Norman Daniels (Oxford: Basil Blackwell, 1975), pp. 17–18. See also Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), n. 81; and Cynthia A. Stark, "Hypothetical Consent and Justification," *Journal of Philosophy* 97, no. 6 (2000), pp. 315–16.

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my house while I am on holiday. We can put this implicit consent in a more general way:

IC_1: When one gives an explicit consent to x, one implicitly gives consent to all those things necessary to fulfill x.

However, this is not the only way one may implicitly consent to something. For example, if you start smoking and you know that with a certain probability p you will get lung cancer, then you have implicitly consented to the fact that you will get lung cancer with probability p. Thus, we can also make the following statement:

IC_2: When one gives an explicit consent to x, knowing that x entails y, one has given implicit consent to y.

Implicit consent is a form of unstated consent, but it is not tacit in a strict sense. The conditions for tacit consent are different from those of implicit consent. The basic difference between tacit and implicit consent is that tacit consent is an omission while implicit consent is an act; both are forms of actual consent. The basic question with tacit consent is: "Under what conditions can silence be taken as a sign of tacit consent?" It is clear that not every silence constitutes tacit consent. When we consider implicit consent, we are asking: "Does someone's explicit consent to y also imply consent to x?"

Hypothetical consent, like implicit and tacit consent, is unstated, but while implicit and tacit consent are forms of actual consent, hypothetical consent is not. Because, quite simply, once I have given my consent, then it cannot be *hypothetical* any more. Hypothetical consent says that *I would have consented if asked*. For example, I would have accepted the offer, had you made it. Hypothetical consent may be formulated in general as follows:

HC: S would have consented to x; therefore, S is obliged to accept x.

Because hypothetical consent is not consent at all in a proper sense of the word, it is more problematic to connect it with autonomy. In hypothetical consent, one is simply not practicing autonomy. In fact, the question here is: "Why should we think that hypothetical consent has any moral force at all?" Ronald Dworkin has formulated the problem as follows:

> If, for example, I am playing a game, it may be that I would have agreed to any number of ground rules if I had been asked in advance of play. It does not follow that these rules may be enforced against me if I have not, in fact, agreed to them. There must be reasons, of course, why I

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> would have agreed if asked in advance, and these may also be reasons why it is fair to enforce these rules against me even if I have not agreed. But my hypothetical agreement does not count as a reason, independent of these other reasons, for enforcing the rules against me, as my actual agreement would have.[3]

On the other hand, it seems that hypothetical consent has at least some moral relevance, and some appeals to hypothetical consent are justified. As Jeremy Waldron has noted:

> Interfering with someone without his consent, but in a way which he would have agreed to be treated had he been asked, is *less wrong* than interfering with him in a way in which, even hypothetically, he would never have agreed to be treated.[4]

This is not enough to make interference legitimate, but it shows, at the least, that one's hypothetical consent seems to make a difference.

The reason why hypothetical consent is considered a form of consent is that it is thought to promote individual autonomy in a manner similar to actual consent. In other words, both get their moral force from people's right to direct their own lives. But our task is to show exactly how hypothetical consent is connected with personal autonomy.

There are two basic questions to be answered in regard to all arguments using hypothetical consent:

1. How should we model or understand hypothetical consent?
2. Why is one obliged to accept the rights and duties implied by hypothetical consent?

When we appeal to hypothetical consent, we should know what it means to say that someone has *hypothetically* consented to something. If we are trying to justify policies or practices by appealing to hypothetical consent, we should, in addition, be able to say why hypothetical consent has or is supposed to have any moral force.

To answer these questions, I will take a closer look at different types of hypothetical consent arguments. In all cases we have to ask two questions. First: "Is this an appropriate way to model hypothetical consent?" And second: "Why does one have to accept the obligation imposed by the argument?"

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[3]Dworkin, "The Original Position," p. 18.

[4]Jeremy Waldron, "Theoretical Foundations of Liberalism," *Philosophical Quarterly* (1987), p. 139.

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Four Basic Types of Hypothetical Consent Arguments

Hypothetical consent arguments can be construed or modeled in several different ways. We can distinguish four basic types of hypothetical consent arguments, characterized by:

(i) the features of consenting agents, and
(ii) the features of the situation in which consent is given (hereafter called the choice situation).

By combining these two variables, we get four basic models of hypothetical consent argument based on:

1. actual agent in actual choice situation,
2. actual agent in idealized choice situation,
3. idealized agent in actual choice situation, and
4. idealized agent in idealized choice situation.

Because both the choice situation and the consenting agent can be idealized in multiple ways, there are several different kinds of arguments of types 2, 3, and 4. Nonetheless, these are the basic models, and they all have some common features. Because of these common features, they also face similar kinds of problems.

1. Actual Agent in Actual Choice Situation (HAA)

The idea behind the first type of hypothetical consent argument we consider is that since an agent would have consented *ex ante* to a certain policy, it is justified to impose that policy *ex post*. We can put this argument in a general form as follows:

> HAA: *S* would have consented to *x* in the circumstances she was in at t_1; therefore, *S* is obliged to accept *x* at t_2.

According to HAA, for example, it is justified for a court to impose certain terms of contract *ex post* because the contracting parties would have consented to these terms when they entered into the transaction. The intuition behind the argument is that a person's actual consent to a policy provides a good moral reason to impose that policy on her, and hypothetical consent is sufficiently similar to actual consent to have a similar kind of normative force. In other words, the fact that a person would have consented *ex ante* to the imposition of a particular policy *p* is a sufficient moral reason to impose that policy *p* on her *ex post*.

One way to defend this kind of hypothetical consent argument is to say that by using HAA, one promotes individual autonomy in a way

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similar to what is being done in the case of actual consent. By applying HAA, in other words, we promote one's freedom of choice, because this is the choice that one *would have made*. This kind of defense, however, does not seem to be successful.

If *S* had chosen *x* at t_1, then *x would have* promoted *S*'s self-interest at t_1. On the other hand, if we know that *x* was *against S*'s self-interest, then we cannot plausibly argue that *S* would have chosen it. (I am *not* saying that it is impossible to choose against one's preferences, but if we do not know *S*'s actual choice, then we should not assume that she would choose something that is against her preferences.) To say that one would have chosen something is simply to say that *it was* in one's self-interest. HAA thus claims that *S* is obliged to accept *x* at t_2, because it was in her self-interest at t_1.

If this is correct, then the argument is heading for trouble. To say that one would have consented to a particular state of affairs at time t_1 is to say that it was compatible with one's preferences at t_1. But why should I now, at time t_2, accept something that was my preference at t_1, if my preferences have changed? The only possible answer seems to be that one is not allowed to change preferences, but this answer could not be correct. There is nothing morally improper about changing one's preferences when circumstances change, so there is no reason to hold me to my earlier preference. This is illustrated clearly in the following example by Daniel Brudney:

> Suppose I wake up and find the air warm and hear the pounding of the surf. I get in my car to drive to the mall to buy a surfboard. But the freeway is jammed and by the time I reach the mall a cold rain has swept through town. I change my mind and buy a book instead. Had I reached the mall quickly I would have bought the surfboard, but with changing circumstances come changing preferences. Unless I have put my initial preference into action, perhaps by calling the surfboard store and asking them not to sell their last board, there is nothing morally suspect about my decision to buy a book when at last I reach the mall.[5]

The mistake behind HAA lies in its assumption that one is not morally allowed to change one's preferences when circumstances change. If the justification for HAA is that it promotes one's self-interest, then

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[5]Daniel Brudney, "Hypothetical Consent and Moral Force," *Law and Philosophy* 10 (1991), p. 239.

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if one's preferences change, there is no reason to hold one to one's earlier preference.

There is also another problem with HAA. It could be the case that the agent possesses information at t_2 that was unavailable at t_1. It is hardly an acceptable conclusion that I am now, at t_2, obliged to buy your broken-down car because I would have wanted to buy it at t_1 when I did not know it was broken.

2. Actual Agent in Idealized Choice Situation (HAI)

Let us turn now to the second type of hypothetical consent argument. In the HAA, we asked what the agent would have chosen in the actual circumstances. It is probably more common, however, to model the hypothetical consent argument so that we ask what the agent would have chosen in somewhat different circumstances. This model of hypothetical consent argument can be put in a general form as follows:

> HAI: *S* would have consented to *x* in the idealized circumstances *C*; therefore, *S* is obliged to accept *x* now in the different kind of circumstances C_2.

A crucial question with arguments of this type is how the circumstances are idealized. The term "idealized circumstances" is too ambiguous if we want to evaluate the normative force of HAI arguments. Circumstances can be idealized in many ways. Let us consider two fundamental ways of doing this:

1. Facts of the actual choice situation may be changed, and
2. information available about the facts of the actual choice situation may be changed.

If the choice situation is idealized through changing the facts of the actual choice situation, the HAI argument seems to have no moral force whatsoever. It might be true that you would have bought my car if it were in good working order, but that is no reason for you to be obliged to buy my car when it has broken down. Changing the facts of the situations is thus prohibited when using HAI.

Let us now consider the situation where the circumstances are idealized regarding the information available. The choice situation may be idealized in two ways regarding information: there can be more or less information available than in the actual choice situation. Let us consider first the case in which the agent is deprived of some relevant information in the choice situation. There may be several reasons for using this type of hypothetical consent argument. The most obvious

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reason is that by idealizing the choice situation, those features of the agent which are thought to be "morally irrelevant" can be disregarded. In other words, the choice situation can be idealized so that the agent does not know whether she will in the end actually benefit or lose from her choice.

If the agent does not know some relevant features of the situation, then she does not know whether her decision will benefit her personally. This variation of HAI says that *S* is obliged to accept policy *p*, because *S* would have consented to the policy *p* in the situation where she did not have information on some relevant features of her situation.

This variation of HAI, however, seems to get into deep trouble. First, one may ask "what reasons does an agent have to comply with the hypothetical terms to which she would have agreed in totally different circumstances?" In fact, the case when there is less information available resembles the situation where the facts of choice situation are changed. It might be true that if you had not had the information that my car had broken down, you would have bought it. However, that is no reason for you to be obliged to buy my car. I will turn back to the problematics of idealized choice positions later.

Let us now turn to the case when there is more information available. This is perhaps the most widely used variation of HAI argument. Compared to former variations, this also seems to be more reasonable. It sounds quite reasonable that you would not have bought my car if you had had the information that it was not functioning, and therefore you are not obliged to accept our transaction. This example uses HAI in negative form, in other words:

HAI_2: *S* would *not* have consented to *x* in the idealized circumstances *C*; therefore, *S* is *not* obliged to accept *x*.

One advantage of HAI—and naturally also its negative form HAI_2—lies in its confirmability in principle. Judgments about what *S* would have done in such and such circumstances can be confirmed by asking *S* what she would have done. Of course, there are cases when it is difficult to imagine what to do in certain conditions, and one's word about what she would do in such circumstances is not reliable. For example, if you ask someone how much money she would give to charity if she had one million dollars, the amount she says she would give is probably much greater than she would give if she had the money in reality. The car example suggests that when a person lacks some relevant information, it could be sometimes plausible to appeal to one's hypothetical consent.

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Let us consider another example. In *On Liberty*, John Stuart Mill argues that:

> If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.[6]

This argument can also be presented in the terms of hypothetical consent. It is justified to turn him back because he would consent to that if he knew that the bridge is unsafe.

The general form of argument is the following:

HAI_3: *S* would give her consent to *x* if she had the relevant information; therefore, *S* is obliged to accept *x*.

Applying this to Mill's example, *S* is obliged to accept the interference because *S* would give her consent to the interference if she had the information that those who interfere have—information that would change her choice.

The most important advantage of HAI_3 is that it respects individual autonomy. It does not impose any alien goals on an agent, and so it does not conflict with the right of a competent person to direct his own life. In fact, HAI_3 can be seen to facilitate the achievement of goals held by the agent.

There are, however, two problems with HAI_3. First, there are occasions when we might appeal to HAI_3 in a manner which fails to respect a person's most basic beliefs. Someone can, for example, claim that if a Jehovah's Witness believed that there is no God, she would have consented to a blood transfusion, and is therefore obliged to accept the blood transfusion. Although it could be true that there is no God, this conclusion does not seem plausible. To avoid this problem, we must clarify what it actually means to say that someone would have consented to something if she had had the relevant information for making her decision. This condition only requires the agent to be *aware of all evidence* or arguments relevant to her choice. The question

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[6]John Stuart Mill, *On Liberty*, in *On Liberty; Representative Government; The Subjection of Women*, ed. Millicent Garrett Fawcett (Oxford: Oxford University Press, 1963), p. 118.

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is not what one would choose if she had *beliefs* that she lacks in reality, but what she would choose if her *epistemological decision base* were in some respect different. Although a Jehovah's Witness would choose differently if she believed that there is no God, this is not the thing we are interested in. The question we should ask is what she would choose if she had all the relevant information for making her choice. Even if there were strong evidence that God does not exist, she surely can still believe in God.[7]

We should also note that some beliefs are central to the subjects' conceptions of their own personal identity. There is a vast difference, for example, between preventing someone from drinking poisoned wine and imposing a transfusion on a Jehovah's Witness. The belief that one ought to drink poison is not central to anyone's conception of her personal identity, but the belief that God exists might be.

The second problem with HAI_3 is more complicated: We do not need the whole idea of hypothetical consent in HAI_3 types of justifications. HAI_3 claims that one is obliged to accept x because it is in her self-interest. If x is not in one's self-interest, then the argument simply fails. Because the justificatory force of HAI_3 relies solely on one's preferences, there is a good reason to ask if it is a form of consent justification at all. The problem is that the argument builds consent analytically into the ordering of a person's preferences. There is absolutely nothing in the concept of consent that is not already contained in a statement about one's preferences. To say that one would consent to the move from one state of affairs to another adds nothing to the claim that one prefers one state of affairs over the other. It seems to be exactly the same thing to say that something is justified because it increases one's welfare, and to say that it is justified because one would give a consent to it.[8] Thus, HAI_3 seems to be merely a welfarist argument in a contractarian disguise.

This objection, however, assumes that one is the best (or is at least a reliable) evaluator of one's own interests. If one is not a reliable evaluator of one's self-interest, it will not be the same thing to say that something is justified because it increases one's welfare, and to

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[7]See Donald VanDeVeer, *Paternalistic Intervention* (Princeton, N.J.: Princeton University Press, 1986), p. 80.

[8]See Jules Coleman, "The Foundation of Constitutional Economics," in *Market, Morals, and the Law* (New York: Cambridge University Press, 1988), pp. 135–38.

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say that it is justified because one would give consent to it. Let us consider again the blood transfusion case. One might argue that a blood transfusion is actually in the Jehovah's Witness's self-interest, although she would not give her consent to it. On the basis of one's self-interest, it would, thus, be justified to impose a transfusion, but on the basis of one's hypothetical consent, it is not.

On this account, the reason why it is not morally right to impose a transfusion on a Jehovah's Witness cannot be one's self-interest. The reason, instead, must be that *one would not give her consent to it* (assuming she is not able to express her will). It would violate her autonomy. One may disagree with my example and argue that it is, in fact, in the interest of the Jehovah's Witness to refuse to agree to a transfusion. However, it is not at all difficult to imagine other examples where one clearly is not a reliable evaluator of one's self-interest in a sense that one does not know what is best, given one's goals. In that kind of case, it seems justified to say that although a certain policy p would be in the agent's best self-interest, it is not accepted because one would not give one's consent to it. In other words, any other kind of policy would go against one's autonomous will. Under these assumptions, HAI_3 seems to be a plausible form of hypothetical consent argument.

3. Idealized Agent in Actual Choice Situation (HIA)

In the models of hypothetical consent presented above, the agent who was in a hypothetical choice situation had the same properties and beliefs as the agent who was supposed to be under an obligation to accept the choice of the hypothetical agent. However, this is not the only possible way to make a hypothetical consent argument.

Instead of asking what the actual agents would have wanted, one may also ask what an idealized agent would have wanted. This kind of argument does not say that the actual agent under consideration would have consented to a policy. It says that a similarly situated agent with certain ideal properties would have consented to that policy. The argument can be put in a general form as follows:

HIA: Idealized agent A would have consented
to x in the circumstances agent S was in at t_1;
therefore, S is obliged to accept x at t_2.

Agents may be idealized at least in three respects: their preferences, beliefs, and cognitive capacities. One reason for using this kind of hypothetical consent argument is that we do not know the preferences, beliefs, or cognitive capacities of the actual agent. An agent may be

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unable to express herself or be unreliable. Then, for example, we can argue that a person with preferences, beliefs, and cognitive capacities that the majority of similarly situated agents have would have consented to policy *p*, and, therefore, one is obliged to accept policy *p*. Another, and probably more common, form of HIA argument goes as follows:

> FRA: Fully rational agent *A* would have consented to *x* in the circumstances agent *S* was in at t_1; therefore, *S* is obliged to accept *x* at t_2.

One problem with the FRA is that an action that would have been chosen by a fully rational person is not necessarily the same that some actual agent *S* would have chosen. The choices of a fully rational person *A* and the choices of an actual agent *S* may in many cases coincide, but it is not always so. Because the choices of a fully rational agent and an actual agent are not identical, FRA fails to respect individual autonomy. Therefore, it does not seem possible to call this a form of hypothetical consent.

One may argue that *S* would change her choice if *S* were aware that a fully rational person would choose differently. A person always prefers the choices of fully rational persons if her choices are not the same. What is going on here is that we are trying to justify one form of consent argument by appealing to another. It is justified to appeal to the choices of fully rational agents because if *S* were aware of the choice of a fully rational person, she would make this choice. This argument, however, seems to be a purely welfarist justification.[9] The notion of hypothetical consent is playing no independent role in the justification.

We should also note that, although I may always prefer the choices of a fully rational agent, in the case of hypothetical consent, I am not

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[9]There is one possible escape from this conclusion. Jules L. Coleman has proposed that we can see the relationship between rational bargaining and hypothetical consent as epistemic, not analytic. In other words, what would have been rational for parties *ex ante* does not entail what parties would have wanted to do, but it is still the best evidence of it. In the absence of contradictory evidence, it is justified to infer that the parties would have consented to whatever would have been the outcome of rational bargaining between them. By changing the analytic interpretation to epistemic, we can connect the HAA with individual autonomy. See Jules L. Coleman, *Risk and Wrongs* (New York: Cambridge University Press, 1992), p. 170.

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making a choice at all. Someone else makes the choice for me, and justifies it by the fact that a fully rational person would have consented to it, and that I would choose what a fully rational person chooses. However, it is a different thing for me to actually change my mind and make a new choice. If I do change my choice because it is not the one a fully rational agent would have made, I am practicing my autonomy. But in the argument presented above, I am not making a choice at all; someone else makes it for me. It is important to see that not only the content of consent but the act of consent itself matters. To be able to choose is valuable in itself. As Gerald Dworkin puts it: "To be able to choose is a good that is independent of the wisdom of what is chosen."[10]

The main problem with HIA is that it allows imposing goals on *S* that she would not autonomously choose. The other problem is that there seems to be no reason for the real life agents to comply with the hypothetical terms to which ideal agents would have agreed.

4. Idealized Agent in Idealized Choice Situation (HII)

The last type of argument from hypothetical consent under consideration is an argument where both the consenting agent and circumstances are idealized. We may formulate this in a general form as follows:

> HII: Idealized agent *A* would have consented to *x* in the idealized circumstances *C*; therefore, agent *S* is obliged to accept *x* now in the different kind of circumstances C_2.

There are some obvious reasons for using this kind of hypothetical consent argument. Arguments of type HII are usually thought to have some special moral force because the self-interest of the agents can be disregarded. By HII, it is thought to be possible to use consent-based justification (that is, autonomy-based justification) for decisions where there are both losers and winners. In other words, it is possible to say that the losers of some policy decision would themselves have consented to that policy.

John Harsanyi has used this kind of argument to argue that it is possible to exclude nonethical subjective preferences if an individual's preferences:

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[10]Gerald Dworkin, "Paternalism," in *Paternalism*, ed. Ralf Sartorius (Minneapolis: University of Minnesota Press, 1983), p. 27.

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> indicate what social situation he would choose if he did not know what his personal position would be in the new situation chosen (and in any of its alternatives) but rather had an equal chance of obtaining any of the social positions existing in this situation, from the highest to the lowest.[11]

The argument says that because an idealized agent *A* from some idealized choice position would have found it in her own interest to agree to the policy *p*, those agents who lose from that policy decision are obliged to accept that policy.

Rawls's argument based on the idea of an original position, where rational egoists make a choice behind the veil of ignorance, is perhaps the most famous example of this kind of argument. The choices are thought to have moral force when the veil of ignorance is removed and the agents have revealed their actual characteristics.

Behind the veil of ignorance, the agents do not know their race, gender, age, natural abilities, conception of good, and other similar things. Agents are also supposed to be rational, not envious egoists. Thus, in Rawls's argument, both the choice situation and the choosing agent are idealized. Rawls's idea is that choices made in this kind of choice position have moral force which makes agents obliged to accept policies they have chosen behind the veil of ignorance after the veil has disappeared.

I have my doubts. Why should we think that the choices of idealized agents who do not know their personal characteristics apply to either the winners or losers of the chosen policy? It does not seem to be "their" choice at all. We can bring the same objection against HII which I gave earlier to HIA: Real life agents seem to have no reason to comply with the hypothetical terms to which ideal agents in the ideal circumstances would have agreed.

Not everyone is happy with my criticism, and Rawls's argument seems to touch some of our deepest moral intuitions. My criticism does not deny such intuitions, nor do I say that Rawls's argument cannot be used to determine *the content of our duties*; it might (or might not) be an excellent heuristic tool for this. The object of my criticism is

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[11]John Harsanyi, in his famous papers "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking" and "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility," both in *Essays, Social Behavior, and Scientific Explanation* (Dordrecht: Reidel Cop., 1976), p. 14.

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elsewhere: Rawls's argument is unable to prove the *existence* of any duty. This is an important distinction when we consider the normative force of hypothetical consent arguments.[12] In fact, Rawls himself does not seem to claim that our duties are derived from the original position. In *A Theory of Juctice* he writes, "A fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us."[13] This duty is independent of the principles derived from original position.

The mere fact that agents are impartial in the choice position is insufficient to make the outputs of the choice position anyone's duty. Justification for imposing significant losses on someone cannot simply be that the loser would have consented to it behind the veil of ignorance. In no sense is it the *loser's* choice; *losers* would not consent to that policy.[14] The basic problem with this kind of argument is that it makes no sense at all to speak of choosing or consenting to something in the absence of knowledge of one's personal social position, preferences, tastes, etc. The hypothetical choice of an ideal agent in ideal circumstances is in no sense any real agent's choice, and therefore there seems to be no reason to talk about one's hypothetical consent.

Conclusion

In this article, I have analyzed different ways of understanding hypothetical consent arguments. There are three kinds of problems with all arguments using the notion of hypothetical consent: conceptual, substantive, and technical. The conceptual problem concerns how we should understand the notion of hypothetical consent. The substantive problem concerns the normative consequences of this kind of argument. The technical problem concerns the way to determine what someone would have wanted.

I have argued that the appeals to hypothetical consent are often either unjustified, or, when they seem to be justified, can be presented in welfarist terms, and the whole idea of hypothetical consent becomes

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[12]See Brudney, "Hypothetical Consent and Moral Force," p. 253.

[13]John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), p. 115.

[14]See T.M. Scanlon, "Contractualism and Utilitarianism," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (New York: Cambridge University Press, 1982), pp. 122–23; see also Thomas Nagel, *Mortal Questions* (New York: Cambridge University Press, 1979), ch. 8.

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pointless. Only one model of hypothetical consent argument under very restricting assumption may have independent moral force. This argument includes the following assumptions:

(1) agent is not able to choose according to her self-interest (agent does not know what is best for her),

(2) agent lacks relevant information for her choice, and

(3) agent would choose differently if she had the relevant information available.

If I am right, then appealing to one's hypothetical consent in all the other cases is unjustified, or, if justified, simply a utilitarian argument, leaving the idea of hypothetical consent with no independent role in justification.

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AUSTRO-LIBERTARIAN THEMES IN EARLY CONFUCIANISM

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CONFUCIANISM: THE UNKNOWN IDEAL

When scholars look for anticipations of classical liberal, Austrian, and libertarian ideas in early Chinese thought, attention usually focuses not on the Confucians, but on the Taoists, particularly on Laozi (Lao-tzu), reputed author of the Taoist classic *Daodejing* (*Tao Te Ching*).[1]

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A note on Chinese names and terms: There are several systems of romanization for Chinese names, the two most familiar being Pinyin and, in English-speaking countries, Wade-Giles, with the former now beginning to displace the latter. The two systems are different enough that terms in one system are often unrecognizable in the other. In two instances, in addition to the Wade-Giles and Pinyin transliteration, names are commonly Latinized: Confucius and Mencius.

Throughout this essay I employ Pinyin. For the reader's convenience, I also give the Wade-Giles equivalent (when it differs from the Pinyin) and the Latin in parentheses at the first occurrence of each term in text and footnotes. Terms in quotations and names of published articles and books are left as is, with the equivalents in parenthesis as appropriate.

An appendix of transliterations is offered at the end of the article.

[1]Laozi (Lao-tzu), *Daodejing*, in *Readings in Classical Chinese Philosophy*, ed. and trans. Philip J. Ivanhoe and Bryan W. Van Norden (New York: Seven Bridges Press, 2001), pp. 157–201. The reader is cautioned that the authorship of many ancient texts is in controversy, e.g., writings attributed to Laozi or Kongfuzi (K'ung-fu-tzu or Kongzi or Confucius) may have been written by them, their students, or others. Many such ancient text are available in multiple translations, and, in several instances, I will be drawing from more

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For example, David Boaz's *Libertarian Reader* is subtitled "Classic and Contemporary Writings from Lao-tzu to Milton Friedman."[2] In *Libertarianism: A Primer*, Boaz identifies Laozi as the "first known libertarian."[3] No Confucian thinker makes an appearance in either work. Murray Rothbard likewise declares, in the first chapter of his *History of Economic Thought*: "The Taoists were the world's first libertarians, who believed in virtually no interference by the state in economy or society, and the Confucians were middle-of-the-roaders on this critical issue"— coming from Rothbard, this characterization of Confucianism amounts to irrevocable damnation and consignment to outer darkness.[4]

Whatever Boaz and Rothbard agree on must practically be libertarian orthodoxy; nevertheless, I venture a dissent. It is true that Taoist writings often contain magnificent insights into the effectiveness of spontaneous order and the evils of coercion and governmental control, and it is likewise true that the Confucians can all too often be preachy, hidebound, starchy apologists for an authoritarian status quo. If that were the whole story, the Taoists would have to win hands down. But it is not the whole story, and once the whole story is on the table, it will become clear that, from a libertarian perspective, the Taoists have been overrated and the Confucians underrated.

The Taoists were deeply suspicious of statism, yes, and God love 'em for it, but *why* were they so? To a significant degree, it was because they associated statism with other things that *also* aroused their suspicion: reason, language, commerce, civilization. The notion that those items could exist and flourish *without* centralized government control was as foreign to the Taoists as to any statist; they accepted the connection, but reversed the evaluation.

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than one translation. I shall endeavor to be clear about which translation I am citing in such cases.

[2]David Boaz, *The Libertarian Reader: Classic and Contemporary Writings from Lao-tzu to Milton Friedman* (New York: Free Press, 1997).

[3]David Boaz, *Libertarianism: A Primer* (New York: Free Press, 1997), p. 27.

[4]Murray N. Rothbard, *Economic Thought before Adam Smith*, vol. 1 of *An Austrian Perspective on the History of Economic Thought* (Cheltenham, U.K.: Edward Elgar, 1995), p. 23. The only Confucian to earn Rothbard's praise as a proto-libertarian is 2nd century BCE historian Sima Qian (Ssu-ma Ch'ien), about whom more below. However, Rothbard does not identify Sima as a Confucian or, apparently, see any continuity between his ideas and the distinctive themes of the Confucian tradition. See Rothbard, *Economic Thought before Adam Smith*, pp. 26–27.

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With regard to reason and language, one of the central messages of Taoism is that all abstract categories and linguistic distinctions falsify our lived experience—a doctrine that has traditionally been anathema to libertarians.[5] The Taoists oppose government control because it is too rational; trying to impose planning on society and trying to impose coherence on one's own thoughts are equally bad, and for the same reasons. The Confucians, by contrast, resemble contemporary libertarians in their stress on logical consistency and precision in terminology. Indeed, they are strikingly reminiscent of today's libertarians in their obsession with what Confucians call the "rectification of names"[6]—dissolving pernicious ethical and political mystification by applying the proper descriptions to social phenomena—whereas for the Taoists, all such classifications are arbitrary and optional, since "the way that can be spoken is not the constant Way" and "the name that can be named is not the constant name."[7]

With regard to commerce and civilization, here is Laozi's sketch of the Taoist utopia:

> Lessen the population. Make sure that even though there are labor saving tools, they are never used. Make sure that the people look upon death as a weighty matter and never move to distant places. Even though they have ships and carts, they will have no use for them. . . . Make sure that the people return to the use of the knotted cord [in lieu of writing]. . . . Then even though neighboring states are within sight of each other, [and] can hear the sounds of each other's dogs and chickens . . . people will grow old and die without ever having visited one another.[8]

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[5]For the views of F.A. Hayek and Ayn Rand on this issue, see Roderick T. Long, "The Benefits and Hazards of Dialectical Libertarianism," *Journal of Ayn Rand Studies* 2, no. 2 (Spring 2001), pp. 406–18.

[6]Kongfuzi (K'ung-fu-tzu or Confucius), *The Analects of Confucius (Lun Yu): A Literal Translation With an Introduction and Notes*, trans. Chichung Huang (Oxford: Oxford University Press, 1997), pp. 132–33. The reader is cautioned that *Analects* is available in more than one translation, and three different translation are cited in this article. See also Xunzi (Hsün Tzu), *Hsün Tzu: Basic Writings*, ed. and trans. Burton Watson (New York: Columbia University Press, 1963), pp. 139–56.

[7]The opening lines of the *Daodejing*; for a discussion of their translation, see Ivanhoe and Norden, *Readings in Classical Chinese Philosophy*, p. 159.

[8]Laozi, *Daodejing*, p. 199. There is a flavor of Pol Pot; one wonders how the sage advice to "lessen the population" is going to be implemented.

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Bao Jingyan (Pao Ching-yen), a later Taoist that Rothbard singled out for praise, offers a similarly primitivist portrait:

> In earliest antiquity, there were no rulers and no officials. . . . There were no trails and paths through the mountains, and neither boats nor bridges existed in the waters. When streams and valleys offered no passage, there was no spreading land-ownership encroachment. . . . Purity and naïveté resided in all breasts, so calculating thoughts did not arise. People munched their food and disported themselves; they were carefree and contented. . . . They have no spreading lands to arouse avarice, they have no walled cities to be taken as useful, they possess no gold and gems that others might covet.[9]

No writing, education, material improvements, curiosity, travel, or trade—this is not exactly the Hayekian "Great Society." Anarchic it may be, but it is less the dynamic market-based anarchism of Rothbard than the primitivist, acorn-munching anarcho-stagnation of Rousseau's *Second Discourse*.[10] If this is the price of freedom, statism begins to look good.

The early Confucians, by contrast, may not be as radical in their anti-statism as the Taoists, but they make up for this flaw by firmly yoking their anti-statism to the cause of civilization, commerce, and the Great Society; their overall program looks more like contemporary libertarianism than the Taoist program does. One 2nd c. BCE Confucian text, while noting approvingly Laozi's hostility to despotism,[11] sharply criticizes Laozi for wanting to "drag the present age back to the conditions of primitive times and to stop up the eyes and ears of the people"; the best ruler instead "accepts the nature of the people," which is to long for "ease and comfort," and "beautiful sounds and forms."[12]

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[9]Quoted in Kung-chuan Hsiao, *From the Beginnings to the Sixth Century A.D.*, vol. 1 of *A History of Chinese Political Thought,* trans. F.W. Mote (Princeton, N.J.: Princeton University Press, 1979), pp. 624–27. See also Rothbard, *Economic Thought before Adam Smith*, pp. 25–26.

[10]Jean-Jacques Rousseau, *First and Second Discourses*, ed. Roger Masters (New York: Bedford/St. Martin's, 1969).

[11]Sima Qian, *Records of the Grand Historian: Han Dynasty II,* rev. ed., trans. Burton Watson (Hong Kong: Columbia University Press, 1993), pp. 379–80.

[12]Sima, *Han Dynasty II*, pp. 433–34.

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POWER AND MARKET

Confucianism, like Chinese philosophy more generally, emerged during a lengthy period of political fragmentation in the wake of the collapse of the Zhou (Chou) Dynasty; this five-century interregnum between the Zhou and Qin (Ch'in) dynasties, running from the 8th through 3rd centuries BCE, is called the Eastern Zhou period.[13] As in Renaissance Italy, with political decentralization came bloody warfare on the one hand, and economic and cultural flowering on the other. As the empire split into independent states, scholars competed vigorously for the chance to serve as political advisors to the emerging new régimes; it is from this situation that Chinese philosophy emerged.[14] The resulting era of cultural creativity is sometimes called the "hundred schools" period. One of these schools was the Confucian tradition, founded by the itinerant teacher Kongfuzi (K'ung-fu-tzu or Confucius; 6th–5th c. BCE); Kongfuzi's doctrines were soon elaborated by a host of subsequent thinkers, most notably Mengzi (Meng-tzu or Mencius; 4th c. BCE), Xunzi (Hsün-tzu; 3rd c. BCE), and Sima Qian (Ssu-ma Ch'ien; 2nd c. BCE).

While no school of early Chinese thought is *consistently* libertarian, the Confucians score higher than any of their rivals, offering many intriguing anticipations of contemporary libertarian ideas, while the Taoists often receive undeserved credit for what are properly Confucian ideas. The libertarian notion of *spontaneous order*, for example, appears to have originated in the Confucian tradition, only to be borrowed by Taoist writers and put forward as a Taoist invention (muddling it up with primitivism in the process). The dependence of Taoism on Confucianism has been obscured by the fact that Laozi, the purported author of the *Daodejing*, has traditionally been identified with Lao Dan (Lao Tan), an older contemporary of Kongfuzi. This would place the *Daodejing* in the 6th century BCE, making its author the earliest proponent of spontaneous order in Chinese literature. Both Boaz and Rothbard accept this early date, but contemporary Sinologists are now

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[13]The Eastern Zhou period is often divided into the Spring-and-Autumn period (8th–5th c.) and the Warring States period (5th–3rd c.). The name "Eastern Zhou" derives from the location of the nominal capital maintained by what was left of the Zhou royal house during this era; the preceding era, that of the Zhou Dynasty proper, is called the Western Zhou.

[14]See Burton Watson, introduction to Xunzi, *Hsün Tzu*, pp. 3–4; and Cho-yun Hsu, *Ancient China in Transition: An Analysis of Social Mobility, 722–222 B.C.* (Stanford, Calif.: Stanford University Press, 1965), pp. 3–4.

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in near-unanimous agreement that the *Daodejing* is a product of the 3rd century BCE (or the late 4th, at the earliest).[15] This redating means that the spontaneous-order teachings of Laozi, like those of his Taoist contemporary Zhuangzi (Chuang-tzu), were composed *after* the spontaneous-order teachings of Confucians like Kongfuzi and Mengzi.

The natural universe, Kongfuzi observes, maintains order without giving commands,[16] and the ruler should do likewise, remaining motionless like the north star and letting the people revolve spontaneously around him.[17]

> If you yourself are correct, even without the issuing of orders, things will get done; if you yourself are not correct, although orders are issued, they will not be obeyed.[18]

> Was not Shun one who ruled by means of *wuwei* [non-action]? What did he do? He made himself reverent and took his position facing south [i.e., adopted the ritual posture of the Emperor], that is all.[19]

Mengzi concurs with Kongfuzi's preference for spontaneous order over imposed order:

> There was a man from Sung who pulled at his rice plants because he was worried about their failure to grow. Having done so, he went on his way home, not realizing what he had done. "I am worn out today," said he to his family. "I have been helping the rice plants to grow." His son rushed out to take a look and there the plants were, all shriveled up. There are few in the world who can resist the urge to help their rice plants grow.[20]

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[15]See, e.g., Fung Yu-lan, *The Period of the Philosophers (From the Beginnings to circa 100 B.C.)*, vol. 1 of *A History of Chinese Philosophy* (Princeton, N.J.: Princeton University Press, 1952), p. 170; and Angus Graham, *Disputers of the Tao: Philosophical Argument in Ancient China* (La Salle, Ill.: Open Court, 1989), pp. 215–19.

[16]Kongfuzi, *Analects*, trans. Huang, p. 170; cf. Xunzi, *Hsün Tzu*, pp. 79–88; and Mengzi (Meng-tzu or Mencius), *Mencius*, trans. D.C. Lau (London: Penguin, 1970), p. 143. The reader is advised that more than one translation of *Mencius* is cited in this article.

[17]Kongfuzi, *Analects*, trans. Huang, p. 52.

[18]Kongfuzi, *Analects*, trans. Huang, p. 134.

[19]Kongzi (Kongfuzi or K'ung-fu-tzu or Confucius), *Analects*, in Ivanhoe and Norden, *Readings in Classical Chinese Philosophy*, p. 41.

[20]Mengzi, *Mencius*, trans. Lau, p. 78.

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It is in reading such Taoist-sounding Confucian passages as these that we need to remind ourselves that the Confucians came first.

Kongfuzi's enthusiasm for spontaneous order translates into a distinct lack of enthusiasm for the institution of punishment.[21] Later Confucians generally have a more favorable attitude toward punishment,[22] but still favour moderating its harshness; in particular, the common practice of punishing the entire family for the act of an individual is forcefully rejected.[23]

Consider 2nd-century BCE Confucian Jia Yi (Chia I):

> When punishments and penalties accumulate, the people turn away in resentment. . . . When they are bludgeoned with laws and commands, and as the application of laws and commands reaches the point of saturation, the prevailing mood among the people is one of sadness.[24]

The Confucian position contrasts with that of another rival school, the Legalists, who argued that punishments should be as harsh as possible to maximize their deterrent effect.[25] Legalists favored punishing minor transgressions as harshly as major ones, a policy later implemented in the Qin Dynasty. Sima Qian takes obvious satisfaction in describing the way in which this policy backfired.[26] When minor and major transgressions were punished equally harshly, people became willing to commit a major transgression to avoid being caught for a minor one (a point also made nowadays by libertarian critics of

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[21]Kongfuzi, *Analects*, ed. Huang, pp. 52, 130; also Kongfuzi, *The Analects of Confucius: A Philosophical Translation*, trans. Roger T. Ames and Henry Rosemont Jr. (New York: Ballantine, 1998), pp. 164–65.

[22]This is especially true of Xunzi, the most tough-minded and regulation-happy of the early Confucians. See Xunzi, *Xunzi: A Translation and Study of the Complete Works,* 3 vols., trans. John Knoblock (Stanford, Calif.: Stanford University Press, 1988–1994), vol. 3, p. 37.

[23]Mengzi, *Mencius*, trans. Lau, p. 65; Xunzi, *Xunzi*, vol. 3, p. 166–67; and Sima Qian, *Records of the Grand Historian: Han Dynasty I,* rev. ed., trans. Burton Watson (Hong Kong: Columbia University Press, 1993), pp. 290, 470–71.

[24]Quoted in Hsiao, *From the Beginnings to the 6th Century A.D.*, p. 479.

[25]Han Feizi (Han Fei-tzu), *Han Fei Tzu: Basic Writings*, trans. Burton Watson (New York: Columbia University Press, 1964), p. 103.

[26]Sima, *Han Dynasty I*, pp. 1–2; and Sima Qian, *Records of the Grand Historian: Qin Dynasty*, trans. Burton Watson (Hong Kong: Columbia University Press, 1993), p. 80.

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"three strikes–you're out" laws). For all their vaunted insight into incentive structures, the Legalist architects of the Qin legal system failed to grasp this crucial principle—a failure that ultimately led to the collapse of their régime, when a battalion of soldiers already facing the death penalty for a minor infraction (tardiness!) decided they had nothing to lose in trying to overthrow the government.

Confucian writings are characterized by unrelenting hostility to governmental abuse of power. Sima Qian complains that the builders of the Great Wall "made free with the strength of the common people,"[27] and describes power-hungry public officials as "in fact no different from a bunch of bandits who swoop down upon men with drawn swords."[28] Mengzi condemns the seizing of private property for government use;[29] he likewise condemns imperialist expansionism:

> A benevolent man would not even take from one man to give to another, let alone seek territory at the cost of human lives. . . . Those who are in the service of princes today all say, "I am able to extend the territory of my prince, and fill his coffers for him." The good subject of today would have been looked upon in antiquity as a pest upon the people. To enrich a prince who is neither attracted to the Way nor bent upon benevolence is to aid a Chieh [i.e., a tyrant].[30]

Mengzi also writes:

> In wars to gain land, the dead fill the plains; in wars to gain cities, the dead fill the cities. This is known as showing the land the way to devour human flesh. Death is too light a punishment for such men.[31]

And Xunzi argues that a ruler who favors peace and commerce will "hold his armies in reserve and give his soldiers rest"; he can "sit back at ease and goods will pile up, all will be well ordered, and there will be enough of all things to go around."[32]

The Confucians also had a generally libertarian, or at least a classical liberal, attitude toward taxation. Xunzi writes:

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[27]Sima, *Qin Dynasty*, p. 213.

[28]Sima, *Qin Dynasty*, p. 427.

[29]Mengzi, *Mencius*, trans. Lau, p. 113.

[30]Mengzi, *Mencius*, trans. Lau, p. 178.

[31]Mengzi, *Mencius*, trans. Lau, p. 124.

[32]Xunzi, *Hsün Tzu*, pp. 53–54.

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> The tax on the fields shall be one tenth. At barriers and in markets, the officials shall examine the goods but levy no tax. The mountains, forests, lakes, and fish weirs shall at certain seasons be closed and at others opened for use, but no taxes shall be levied on their resources. . . . Goods and grain shall be allowed to circulate freely, so that there is no hindrance or stagnation in distribution. . . . Thus, the people living in lake regions have plenty of lumber and those living in the mountains have plenty of fish. . . . Such goods serve above to adorn worthy and good men, and below to nourish the common people and bring them security and happiness. This is what is called a state of godlike order.[33]

Sima Qian observes that taxes on shipping discourage trade, making goods scarcer and more costly;[34] hence he cites the maxim: "Wealth and currency should be allowed to flow as freely as water!"[35] One modern scholar notes that the Confucians "observed the problem of taxation from the viewpoint of production, which was rather exceptional in the history of ancient financial thought."[36]

Like Adam Smith, the Confucians insist that the "wealth of nations" should be measured in terms of the wealth of the populace, not of the government. Xunzi writes:

> [A ruler] who pays attention only to the collection of taxes will be lost. Thus, a king enriches his people, a dictator enriches his soldiers, a state that is barely managing to survive enriches its high officers, and a doomed state enriches only its coffers and stuffs its storehouses. But if its coffers are heaped up and its storehouses full, while its people are impoverished, this is what is called to overflow at the top but dry up at the bottom.[37]

Accordingly, the Confucians advocated a maximum tax rate of about ten or eleven percent. (The rate actually prevailing was rarely below twenty, and often much higher.)[38]

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[33]Xunzi, *Hsün Tzu*, pp. 43–44. For similar advice from Mengzi, see Mengzi, *Mencius*, trans. Lau, pp. 65–66, 82.

[34]Sima, *Han Dynasty II*, p. 81.

[35]Sima, *Han Dynasty II*, p. 437.

[36]Hu Jichuang, *A Concise History of Chinese Economic Thought* (Beijing: Foreign Languages Press, 1988), p. 53.

[37]Xunzi, *Hsün Tzu*, p. 38.

[38]Kongfuzi, *Analects*, trans. Huang, pp. 127–28; cf. Wing-tsit Chan, ed., *A Sourcebook in Chinese Philosophy* (Princeton, N.J.: Princeton University

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Confucianism has a reputation of being suspicious of commerce and trade, foreign trade especially, but this reputation stems from a later period when the Confucians had established themselves as a privileged bureaucratic and intellectual class, hostile to social mobility and to the new ideas that foreign trade brings.[39] While early Confucianism contains both pro-commerce and anti-commerce strands, the pro-commerce strands predominate. Admittedly, the Confucians do tend to emphasise agricultural over mercantile pursuits,[40] but Xunzi and Sima Qian, for example, nevertheless sing the praises of foreign trade, which ensures that "wherever the sky stretches and the earth extends, there is nothing beautiful left unfound, nothing useful left unused."[41] Mengzi expresses a dim view of entrepreneurial profit,[42] but for Xunzi, when "farmers labor with all their energy to exhaust the potential of their fields" and "merchants scrutinize with keen eyes to get the utmost from their goods," this is a symptom of positive social order and "perfect peace."[43]

Sima, in his praise of Kirzner-style entrepreneurial alertness, waxes nearly Randian:

> These, then, are examples of outstanding and unusually wealthy men. None of them enjoyed any titles or fiefs, gifts, or salaries from the government, nor did they play tricks with the law or commit any crimes to acquire their fortunes. They simply guessed what course conditions were going to take and acted accordingly, kept a sharp eye out for the opportunities of the times, and so were able to capture a fat profit. . . . There was a special aptness in the way they adapted to the times. . . . All of these men got where they did because of their devotion and singleness of purpose. . . . [T]here is no fixed road to wealth, and money has no permanent master. It finds its way to the man of

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Press, 1963), pp. 94, 106. Sadly, the Confucians' maximum rate was also the minimum; Mengzi states that while a higher rate would be rapaciously tyrannical, a lower rate would be barbarically uncouth. See Mengzi, *Mencius*, trans. Lau, p. 179. (Well, I didn't promise libertarian purity.)

[39]This is a recurrent theme in Louise Levathes, *When China Ruled the Seas: The Treasure Fleet of the Dragon Throne, 1405–1433* (Oxford: Oxford University Press, 1994).

[40]Sima, *Han Dynasty II*, p. 84.

[41]Xunzi, *Hsün Tzu*, pp. 43–44; cf. Sima, *Han Dynasty II*, p. 434.

[42]Mengzi, *Mencius*, trans. Lau, p. 92.

[43]Xunzi, *Xunzi*, vol. 1, p.195.

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> ability like the spokes of a wheel converging upon the hub, and from the hands of the worthless it falls like shattered tiles. . . . Rich men such as these deserve to be called the "untitled nobility."[44]

Sima adds that "Poverty and wealth are not the sorts of things that are arbitrarily handed to men or taken away,"[45] but instead track the absence or presence of effort and skill. For Sima, anyone who forgoes productive work, choosing dependence on others without feeling shame, can "hardly deserve to be called human."[46]

Xunzi also expresses enthusiasm for economic prudence and providence: if all people "gave free rein to their desires," never deferring consumption or conserving for the future, then "the material goods of the whole world would be inadequate to satisfy them." A person who "consumes his provisions in an utterly extravagant manner, not considering the consequences," will, in Xunzi's gentle description, inevitably "freeze, starve, be reduced to holding a begging gourd and sack, and will wind up as a skeleton lying in a drainage ditch." The inculcation of "regulations, ritual, and moral principles" leads human beings to "consider the long view of things," and, thus, to "moderate what they expend and control what they desire, harvesting, gathering, hoarding, and storing up goods in order to perpetuate their wealth."[47]

The Confucians also recognized the importance of the division of labour, and the existence of mutual gains from trade. Mengzi observes:

> To trade grain for implements is not to inflict hardship on the potter and the blacksmith. The potter and the blacksmith, for their part, also trade their wares for grain. In doing this, surely they are not inflicting hardship on the farmer either. . . . [I]t is necessary for each man to use the products of all the hundred crafts. If everyone must make everything he uses, the Empire will be led along the path of incessant toil.[48]

The Confucians hit upon other economic principles as well. For example, Mengzi sees that the relative values of two kinds of good

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[44]Sima, *Han Dynasty II*, p. 453.

[45]Sima, *Han Dynasty II*, p. 435.

[46]Sima, *Han Dynasty II*, p. 449.

[47]Xunzi, *Xunzi*, vol. 1, pp.193–95.

[48]Mengzi, *Mencius*, trans. Lau, p. 101; cf. p. 109; Xunzi, *Hsün Tzu*, p. 44; and Fung, *The Period of the Philosophers*, p. 295.

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depends on specific increments of those goods in a given context of choice, and thus comes tantalizingly close to discovering the marginalist-subjectivist solution to the diamond-water paradox. He writes:

> Which is more important, the rites or food? [The rites.] *Suppose you would starve to death if you insisted on the* observance of the rites, but would manage to get something to eat if you did not. Would you still insist on their observance? . . . In saying that gold is heavier than feathers, surely one is not referring to the amount of gold in a clasp and a whole cartload of feathers?[49]

Mengzi also understands the dangers of governmental interference with market prices. Here, he summarizes the views of utopian theorist Xuzi (Hsü-tzu)[50] who had advocated the equalization of prices:

> If we follow the way of Hsü Tzu, there will be only one price in the market, and dishonesty will disappear from the capital. Even if you send a mere boy to the market, no one will take advantage of him. For equal lengths of cloth or silk, for equal weights of hemp, flax, or raw silk, and for equal measures of the five grains, the price will be the same; for shoes of the same size, the price will also be the same.

Mengzi replies:

> That things are unequal is part of their nature. . . . If you reduce them to the same level, it will only bring confusion to the Empire. If a roughly finished shoe sells at the same price as a finely finished one, who would make the latter? If we follow Hsü Tzu, we will be showing one another the way to being dishonest.[51]

The later Confucian document *Yantielun* (*Yen T'ieh Lun*) concurs that if we "standardize the price," then consumers will be left with "no choice at all between the good and the bad" products.[52] (Here, Mengzi and the *Yantielun* have anticipated the libertarian case against rent control: if landlords are forbidden to charge more for a well-maintained property than for a badly-maintained one, they will have no incentive to keep their properties in good repair, and so consumers will be deprived of the opportunity to choose higher quality housing.)

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[49]Mengzi, *Mencius*, trans. Lau, p. 171.

[50]Not to be confused with the Confucian Xunzi (Hsün-tzu).

[51]Mengzi, *Mencius*, trans. Lau, p. 104.

[52]Quoted in Hsiao, *From the Beginning to the 6th Century A.D.*, p. 463.

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Sima Qian too is aware of the operations of the price system, and clearly understands the case for letting it correct itself automatically:

> Society obviously must have farmers before it can eat; foresters, fishermen, miners, etc., before it can make use of natural resources; craftsmen before it can have manufactured goods; and merchants before they can be distributed. But once these exist, what need is there for government directives, mobilizations of labour, or periodic assemblies? Each man has only to be left to utilize his own abilities and exert his strength to obtain what he wishes. Thus, when a commodity is very cheap, it invites a rise in price; when it is very expensive, it invites a reduction. When each person works away at his own business then, like water flowing downward, goods will naturally flow forth ceaselessly day and night without having been summoned, and the people will produce commodities without having been asked. Does this not tally with reason? Is it not a natural result?[53]

Sima also grasps the connection between price inflation and the expansion of the money supply, and, in an early foray into public-choice analysis, tells how a bureaucratic agency established to regulate the iron and salt industries ended up being captured by the very merchants it was supposed to regulate.[54]

In the *Yantielun*, we find the Confucians arguing:

> [T]he physical strength of people may vary; in some regions they are stronger, and in others weaker, presenting quite different conditions. The need may be for larger or smaller implements, circumstances may demand here one shape, there another; localities vary and practices change, and in each particular situation, each implement has its advantages. As the government imposes a single standard for all, iron implements are deprived of their specific aptness, and the farmers lose thereby the particular advantages of each.[55]

Here we see a striking anticipation of Friedrich Hayek's idea that a central planner must necessarily lack "knowledge of the particular circumstances of time and place" on which individual economic actors base their decisions.[56]

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[53]Sima, *Han Dynasty II*, p. 434.

[54]Sima, *Han Dynasty II*, p. 69–71.

[55]Quoted in Hsiao, *From the Beginnings to the Sixth Century A.D.*, p. 463.

[56]Friedrich A. Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1980), p. 84.

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But the Confucians did not merely notice this or that economic principle; they also grasped the *form* and *ground* of economic principles in general. In a passage reminiscent of Menger's and Mises's critiques of economic historicism, Xunzi writes:

> Abandoned incorrigible people say: Ancient and present times are different in nature; the reasons for their order and disorder differ. And many people are thus misled. . . . But why cannot the Sage be so deceived? I say it is because the Sage measures things by himself. Hence by himself he measures other men; by his own feelings he measures their feelings. . . . Past and present are the same. Things that are the same in kind, though extended over a long period, continue to have the self-same principles.[57]

Xunzi not only acknowledges the *necessity* and *universality* of economic principles, he also recognizes their dependence not on empirical observation but on introspection.[58] Hence, the Confucians anticipate the praxeological method of Austrian economics.[59]

As we have seen, Confucians are quick to point out the beneficial social consequences of *laissez faire*, but it would be a mistake to infer that the Confucian case for liberty is purely consequentialist. Respect for the choices of others is not just good social policy, it is also a principle of interpersonal ethics: *shu*, or reciprocity, is summed up in the Confucian maxim: "Do not impose upon others what you yourself do not desire."[60] This statement of the Golden Rule is echoed repeatedly throughout the early Confucian writers, and recommends a broad disposition to behave cooperatively toward others.[61] But the Rule is *not*

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[57]Quoted in Fung, *The Period of the Philosophers*, p. 284.

[58]The Confucian text *Liji* (*Li Chi*) makes a similar point: "The *Book of Odes* says, 'In hewing an axe handle . . . the pattern is not far off.' If we take an axe handle to hew another axe handle and look askance from one to another, we may still think the pattern is far away. Therefore the superior man governs men as men, in accordance with human nature." Excerpted in Chan, *Source Book in Chinese Philosophy*, pp. 100-1.

[59]Hayek, *Individualism and Economic Order*, pp. 63–75.

[60]Kongzi, *Analects*, trans. Ivanhoe and Van Norden, p. 42.

[61]Kongfuzi, *Analects*, trans. Huang, p. 74, 125; Mengzi, *Mencius*, trans. Lau, p. 182; Chan, *Source Book in Chinese Philosophy*, pp. 92, 101; and Graham, *Disputers of the Tao*, p. 20.

Libertarians have sometimes expressed a preference for the Confucian formulation of the Golden Rule over the Christian version, on the grounds

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understood to require cooperative behaviour toward those who refuse to respond in kind; the Confucian sage is not a pushover.[62] To practice *shu* is to cultivate a *reciprocating* disposition.

THE MARKET FOR LIBERTY

Confucians, as we have seen, favor a political order within which market principles are free to operate. But they go one step further: they apply market principles to the political order itself. Workers, Mengzi tells us, should be paid for their actual accomplishments, not for their good intentions.[63] The ruler, too, is seen as a person selected to provide a service; if he does not do his job, he should be discharged:

> [MENGZI] "If the Marshal of the Guards was unable to keep his guards in order, then what should be done about it?"
>
> [KING XUAN] "Remove him from office."
>
> [MENGZI] "If the whole realm within the four borders was ill-governed, then what should be done about it?"
>
> The king turned to his attendants and changed the subject.[64]

As a service provider, the ruler must compete for customers with the rulers of rival states. If a ruler adopts *laissez faire* policies and

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that the Confucian version is characteristically negative (the so-called "Silver Rule") rather than positive. But this is a confusion, for three reasons. First, there is nothing un-libertarian about positive obligations as such; what is un-libertarian is the *enforcement* of positive obligations. (For that matter, the enforcement of negative obligations is *equally* un-libertarian, except in the single case of the obligation to refrain from *aggression*—which is surely just *one* of our negative obligations.) Second, as Nivison points out, Confucian authors in any case alternate freely between negative and positive formulations, and seem to have regarded them as equivalent. And third, the two formulations *are* equivalent, as Nivison likewise shows: "If, having promised to appear this evening, I had not done so, I would still have done something, namely, breaking a promise. Not doing something to another is always, under another description, doing something to that person, and conversely." David S. Nivison, *The Ways of Confucianism: Investigations in Chinese Philosophy*, ed. Bryan W. Van Norden (LaSalle, Ill.: Open Court, 1996), p. 62. Hence, the importance of defining libertarian rights in terms of *aggression*, rather than, say, harm.

[62]Kongzi, *Analects*, trans. Ivan and Van Norden, p. 39.

[63]Mengzi, *Mencius*, trans. Lau, p. 109.

[64]Mengzi, *Mencius*, trans. Lau, pp. 66–67.

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cultivates good will, then merchants, farmers, and scholars from rival states will vote with their feet, coming to settle in his kingdom;[65] if they cannot come to him, they will entreat him to come to their state and liberate them.

> In the market-place, if goods are exempted when premises are taxed, and premises exempted when the ground is taxed, then the traders throughout the Empire will be only too pleased to store their goods in your market-place. If there is inspection but no duty at the border stations, then the travellers throughout the Empire will be only too pleased to go by way of your roads.[66]

If a ruler demonstrates a love for righteousness, the Confucians maintain, "people from other states will flock to him with their children swaddled on their backs."[67] But "when wealth is gathered in the ruler's hand, the people will scatter away from him."[68] "If a ruler ill-uses his people to an extreme degree," Mengzi remarks, "he will be murdered and his state annexed; if he does it to a lesser degree, his person will be in danger and his territory reduced."[69] His ministers will, quite properly, either depose him or abandon him for another state,[70] and his subjects will not fight to defend him.[71]

A king who rules unjustly has no legitimate claim on his subjects' obedience, according to Kongfuzi:

> Duke Ding said: "One remark that can lose a state—is there such a thing?"
>
> Master Kong replied: "One remark cannot do something like that. However, there is one close to it. One man's saying goes: 'I find no joy in being sovereign except that,

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[65]"This expectation derives some substance from the mobility of populations at this period; rulers were, in fact, competing to attract knights with new ideas and skills to their courts . . . and peasants to their still unopened lands." Graham, *Disputers of the Tao*, p. 114.

[66]Mengzi, *Mencius*, trans. Lau, p. 82; cf. pp. 54–58;Kongfuzi, *Analects*, ed. Huang, p. 136; and Xunzi, *Hsün Tzu*, p. 53–55.

[67]Kongfuzi, *Analects*, trans. Huang, p. 133; cf. Chan, *Source Book in Chinese Philosophy*, p. 106.

[68]Chan, *Source Book in Chinese Philosophy*, p. 93.

[69]Mengzi, *Mencius*, trans. Lau, pp. 118–19.

[70]Mengzi, *Mencius*, trans. Lau, p. 159.

[71]Xunzi, *Hsün Tzu*, pp. 52–53.

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> whatever I say, no one disobeys me.' If what he says is good and no one disobeys him, is it not good? If it is not good and no one disobeys him, is it not almost true that one remark can lose a state?"[72]

Mengzi offers a similar example:

> King Xuan of Qi asked, "Is it the case . . . that Wu struck down [his ruler] Zhou? . . . Is it acceptable for subjects to kill their rulers?"
>
> Mengzi said, "One who violates benevolence should be called a 'thief.' One who violates righteousness is called a 'mutilator.' A mutilator and thief is called a mere 'fellow.' I have heard of the execution of a mere fellow 'Zhou,' but I have not heard of the killing of one's ruler."[73]

Here we find Mengzi invoking the Confucian doctrine of "rectification of names" to justify regicide. Kongfuzi had taught: "Let a sovereign act like a sovereign, a minister like a minister, a father like a father and a son like a son."[74] The line could also be translated: "Treat sovereigns as sovereigns, treat ministers as ministers, treat fathers as fathers, treat sons as sons,"[75] but the essential point remains the same: each social role defines a code of proper behaviour for the holder of that role, as well as for others in relation to the holder.[76] But Kongfuzi had also taught that speech must be "in accordance with actuality," so that "the gentleman only applies names that can be properly spoken."[77] Mengzi infers that a ruler deserves the title of "king" only so long as he lives up to the job description;[78] otherwise he becomes a mere

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[72]Kongfuzi, *Analects*, trans. Huang, pp. 135–36.

[73]Mengzi, *Mengzi*, in Ivanhoe and Van Norden, *Readings in Classical Chinese Philosophy*, pp. 120–21.

[74]Kongfuzi, *Analects*, trans. Huang, p. 128.

[75]Chad Hansen, *A Daoist Theory of Chinese Thought: A Philosophical Interpretation* (Oxford: Oxford University Press, 1992), pp. 67–68. Hansen point out that what Kongfuzi *literally* says is typically cryptic: "Sovereign sovereign, minister minister, father father, son son."

[76]For a similar idea in Stoicism, see Epictetus, *The Discourses of Epictetus*, ed. Christopher Gill, trans. Robin Hard (London: J.M. Dent, 1995), pp. 95–98.

[77]Kongzi, *Analects*, trans. Ivanhoe and Van Norden, pp. 34–35.

[78]This idea too has parallels in early Greek thought; one of the earliest statements is in Xenophon's *Memorabilia*. See Xenophon, *Memorabilia; Oeconomicus; Symposium; Apology*, trans. E.C. Marchant and O.J. Todd (Cambridge, Mass.: Harvard University Press, 1992), p. 229.

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"fellow," and defying him involves no disloyalty. One earns the right to royal office by winning the support of the people; in short, the Mandate of Heaven (i.e., legitimacy) accrues to the service provider who outdoes his competitors in pleasing and attracting customers.[79]

The Confucian defense of revolution has obvious classical liberal parallels, but in applying market principles to competition among political jurisdictions, the Confucians more specifically anticipate the core idea of anarcho-capitalism. Where the Confucian theory falls short of anarchism is in the assumption that each service provider must enjoy a territorial monopoly. Non-territorial providers of protection services in ancient China did exist: the so-called "knights," who "often acted as local 'bosses' in defiance of the government authorities, guaranteeing protection to people who sought their aid or hiring out their services in the conduct of private vendettas."[80] Most Confucians, however, looked askance at these wandering freelance vigilantes.

One important exception is Sima Qian, who hails the knights as champions of the defenseless, carefully distinguishing those offering genuine protection from those who were mere thugs.[81] Unfortunately, he does not consider how the Confucian principle of competing jurisdictions might be applied to this type of informal protection service. Confucians also seem not to have recognized that the end result for which most of them hoped—namely, that a single virtuous prince would ultimately win the allegiance of "all under heaven"—might be detrimental to consumer interests, as it would end this salutary competition and establish a monopoly. At any rate, it is never suggested that the empire, once unified, would allow free entry to competing providers of political services.

Taking Rites Seriously

Thus far, I have said little or nothing about what is probably the most distinctive feature of the entire Confucian system: the emphasis on *li*, a term variously translated as "ceremony," "etiquette," "protocol," "rites," and "ritual propriety." As Confucians use the term, *li* stands for the entire inherited body of customary practices, traditions, and

[79]Mengzi, *Mencius*, trans. Lau, p. 143.

[80]Watson, introduction to Han, *Han Fei Tzu*, p.105 n.

[81]Sima, *Han Dynasty II*, pp. 409–12.

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conventions governing early Chinese society. Kongfuzi sees himself above all as a preserver of *li*: "I transmit rather than innovate. I trust in and have a love for antiquity."[82]

But what the Confucians mean by transmitting-rather-than-innovating does not involve a slavish adherence to the past. Kongfuzi notes cases in which he is willing to reflect critically on traditional practice, and accept alterations in ceremonial forms:

> A cap made of hemp is prescribed by the rites, but nowadays people use silk. This is frugal, and I follow the majority. To bow before ascending the stairs is what is prescribed by the rites, but nowadays people bow after ascending. This is arrogant, and—though it goes against the majority—I continue to bow before ascending.[83]

Mengzi likewise endorses the use of reason and independent judgment in applying the requirements of *li*: although ritual forms prescribe that "in giving and receiving, man and woman should not touch each other," nevertheless "in stretching out a helping hand to the drowning sister-in-law, one uses one's discretion."[84]

What Confucians condemn as "innovation," then, is not any and all changes in the *li*, but only changes that attempt to construct social practices *de novo* rather than reforming existing practices from within; it is, in effect, the difference between neologism and Esperanto. This, of course, is a point made familiar to libertarians by Hayek.

Confucians sometimes speak as though the *li* are the products of deliberate design, "produced by the conscious activity of the sages."[85] At other times, Confucians recognize that the *li* embody the experiences of many different people, rather than being constructed from scratch

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[82]Kongzi, *Analects*, trans. Ivanhoe and Van Norden, p. 19.

[83]Kongzi, *Analects*, trans. Ivanhoe and Van Norden, p. 24. The *Liji*, by contrast, attributes to Kongfuzi the claim that only one who possesses *both* virtue *and* supreme political authority has a right to introduce innovations in *li*. See Chan, *Source Book in Chinese Philosophy*, pp. 110–11. But the passage in question also has Kongfuzi referring to social conditions that did not arise until the Qin dynasty, a century and a half after Kongfuzi's era, so it is not authentic. See Fung, *History of Chinese Philosophy*, p. 370. In any case, Kongfuzi clearly doesn't regard the kind of reform-from-within that he advocates as *innovation*.

[84]Mengzi, *Mencius*, trans. Lau, p. 124; cf. p. 171.

[85]Xunzi, *Hsün Tzu*, p. 160. It's significant that this passage is from Xunzi, the most constructivist-oriented of the early Confucians.

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by a handful of sages.[86] Kongfuzi accordingly proclaims that the *li* he treasures have been evolved and improved from dynasty to dynasty through a gradual process of incremental reform-from-within.[87]

Modern readers often find it difficult to sympathize with the Confucian emphasis on arcane ceremonial detail, such as Kongfuzi's fussing about whether to bow before or after ascending the stairs;[88] isn't this just a picky convention of no importance? What difference does it make? Well, it's also a matter of mere convention that the spoken phrase "thank you" differs in meaning from the somewhat similar-sounding phrase "f**k you." But *given* that convention, it's not a matter of indifference which phrase one uses.[89] Likewise, it may be a matter of convention that bowing before ascending (or bowing at all) is a mark of respect in a particular culture, but given that convention, one cannot do otherwise without being disrespectful.

This analogy may be rejected, however, on the grounds that the person who says "f**k you" rather than "thank you" *intends* to give offense. So long as my bowing after ascending is *meant* respectfully, why should my expression of respect be constrained by conventional forms? Well, suppose I say "Hitler may have won World War II," mistakenly believing (as many do) that this means the same thing as "Hitler might have won World War II." My having *intended* something true doesn't change the fact that, given the established rules of grammar, what I have actually said is false. Since libertarians tend to be more than usually persnickety about precision in language, perhaps they should not find Confucian persnicketiness about ritual so alien.

Herbert Fingarette offers an interpretation of the operation of *li* that libertarians should find extremely congenial:

> In well-learned ceremony, each person does what he is supposed to do according to a pattern. My gestures are coordinated harmoniously with yours—though neither of us has to force, push, demand, compel, or otherwise "make" this happen. . . . Confucius characteristically and sharply

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[86]Kongfuzi, *Analects*, trans. Huang, p. 182.

[87]Kongfuzi, *Analects*, trans. Huang, p. 57; and Kongfuzi, *Analects*, trans. Ames and Rosemont, p. 84.

[88]Kongzi, *Analects*, trans. Ivanhoe and Van Norden, p. 24.

[89]Likewise, Xunzi says that although which names go with which objects is a matter of convention and depends on social consensus, the fact that our naming practices are better when they are clear and consistent is *not* a matter of convention. See Xunzi, *Hsün Tzu*, p. 144.

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> contrasts the ruler who uses *li* with the ruler who seeks to attain his ends by means of commands, threats, regulations, punishments and force. . . . The force of coercion is manifest and tangible, whereas the vast (and sacred) forces at work in *li* are invisible and intangible. *Li* works through spontaneous coordination rooted in reverent dignity. . . . I see you on the street; I smile, walk toward you, put out my hand to shake yours. And behold—without any command, stratagem, force, special tricks or tools, without any effort on my part to make you do so, you spontaneously turn toward me, return my smile, raise your hand toward mine. We shake hands—not by my pulling your hand up and down or your pulling mine but by spontaneous and perfect cooperative action. . . . It is in just such ways that social activity is coordinated in civilized society, without effort or planning, but simply by spontaneously initiating the appropriate ritual gesture in an appropriate setting. . . . These complex but familiar gestures are characteristic of human relationships at their most human: we are least like anything else in the world when we do not treat each other as physical objects, as animals or even as subhuman creatures to be driven, threatened, forced, maneuvered.[90]

The practice of *shu*, reciprocity, is thus not just one ritual observance among others; rather, reciprocity is the very *form* of ritual observance. Fingarette concludes that the consistent Confucian must be "a kind of anarchist in the respect that he is radically opposed to the use of force, compulsion, coercion, or punishments in government or in human affairs generally."[91]

Henry Rosemont also agrees that Confucianism has affinities with anarchism—*not*, however, both Rosemont and Fingarette are quick to insist, with *individualist* anarchism, God forbid, with its emphasis on "individual choice" at the expense of "rootedness in tradition and

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[90]Herbert Fingarette, *Confucius: The Secular as Sacred* (Prospect Heights, Ill.: Waveland Press, 1998), pp. 7–11.

[91]Herbert Fingarette, "Response to Professor Rosemont," *Philosophy East and West* 28, no. 4 (1978), pp. 513–14. Against this interpretation, Benjamin Schwartz has pointed out that, as the Confucians see it, "The order that the *li* ought to bind together is not simply a ceremonial order—it is a sociopolitical order in the full sense of the term, involving hierarchies, authority, and power." Benjamin Schwartz, *The World of Thought in Ancient China* (Cambridge, Mass.: Harvard University Press, 1985), p. 68. This is true enough, but the interesting question is not whether the early Confucians were conscious and consistent anarchists (clearly they were not) but whether anarchism represents the most coherent development of their understanding of *li*.

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ceremony,"[92] and its distasteful association with the "rugged individualism" of contemporary libertarianism,[93] but rather with the *communitarian* anarchism of "Kropotkin, or the participants in the various Christian utopian movements."[94] While Confucians and libertarians admittedly both place "a premium on spontaneity," the libertarian, we are told, sees spontaneity as "the purest expression of individualism," while the Confucian instead sees spontaneity as "the fruit and flower of having cultivated, assimilated into oneself, and finally achieved creative mastery of supra-individual norms."[95]

This contrast, however, caricatures both libertarianism and Confucianism. First, if libertarian individualism is truly incompatible with deference to "tradition and ceremony," then Fingarette and Rosemont will have a hard time explaining how Friedrich Hayek, one of the 20th century's chief theoreticians of libertarian individualism (and, while not an anarchist himself, a great inspirer of anarchists), can teach that "true individualism" requires the "willingness to submit" to "the traditions and conventions which evolve in a free society and which, without being enforceable, establish flexible but normally observed rules," conformity to which is both "an essential precondition for the gradual evolution and improvement of rules of social intercourse" and "an indispensable condition if it is to be possible to dispense with compulsion."[96] And second, if Confucianism truly has greater affinity with Kropotkin than with capitalism, how are we to explain the fact that Confucian thinkers consistently rejected the Kropotkin-style autarky and collectivist primitivism of the Taoists in favor of a global network of commerce and trade?[97]

Conceived in Liberty

When the Confucians first formulated their radical *laissez faire* policies, they had yet to have an opportunity to see them implemented. (Many Confucians believed, or pretended to believe, that these policies

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[92]Fingarette, "Response to Professor Rosemont," p. 514.

[93]Henry Rosemont, Jr., "Reply to Professor Fingarette," *Philosophy East and West* 28, no. 4 (1978), p. 518.

[94]Rosemont, "Reply to Professor Fingarette," p. 518.

[95]Fingarette, "Response to Professor Rosemont," p. 514.

[96]Hayek, *Individualism and Economic Order*, p. 23.

[97]Even Mengzi's proposal for land reform—his "well-field system," which is as close to Kropotkin's collectivist agrarian mini-utopia as Confucianism gets—is 89% private property. See Mengzi, *Mencius*, trans. Lau, pp. 99–100.

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had been in effect during the Western Zhou period, but this was a fantasy.) The fall of the despotic, Legalist-inspired, and short-lived Qin dynasty, and the consequent rise of the Han, gave Confucian theorists an unprecedented opportunity. Widespread revulsion against the excesses of Qin led to an anti-authoritarian backlash against the Legalists. *Laissez faire* theorists like the Confucians and Taoists were in high demand, and many soon found themselves in positions of influence.[98]

That influence shows. Emperor Gaozu (Kao Tsu), whom Sima calls a "great sage,"[99] founded the Han Dynasty on the basis of the following minimalist program:

> I hereby promise you a code of laws consisting of three articles only: He who kills anyone shall suffer death; he who wounds another or steals shall be punished according to the gravity of the offense; for the rest I hereby abolish all the laws of Qin.[100]

Of course he didn't really mean it, and the laws of Han soon outgrew the promised confines. Even so, however, the early years of the Han dynasty were a period of relative liberalization. Sima describes the period as follows:

> Formerly, in the time of the Qin, the net of the law was drawn tightly about the empire and yet evil and deceit sprang up on all sides; in the end, men thought of nothing but evading their superiors, and no one could do anything to save the situation. At that time, the law officials worked to bring about order, battling helplessly as though against fire or boiling water. Only the hardiest and cruellest of them were able to bear the strain of office and derive any satisfaction from the task; those who cared for justice and virtue were left to rot in insignificant posts. . . . When the Han arose, it lopped off the harsh corners of the Qin code and returned to an easy roundness, whittled away the embellishments and achieved simplicity; the meshes of the law were spread so far apart that a whale could have passed through . . . and the common people were orderly and content.[101]

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[98]The *laissez faire* tendencies of the early Han have led some scholars to assume that the primary influence on its policies must have been Taoist, but, as we have seen, this is an unwarranted assumption. Certainly the overall Han program of legislation looks more Confucian than Taoist.

[99]Sima, *Han Dynasty I*, p. 88.

[100]Sima, *Han Dynasty I*, p. 62.

[101]Sima, *Han Dynasty II*, pp. 379–80.

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Sima expands this idea:

> After the Han rose to power, the barriers and bridges were opened and the restrictions on the use of the resources of mountains and lakes were relaxed. As a result, the rich traders and great merchants travelled all around the empire distributing their wares to every corner so that everyone could buy what he wanted.[102]

Emperor Wen, one of Gaozu's early successors, abolished the practice of punishing an entire family for the transgressions of an individual, abolished mutilation as a category of punishment, and abolished taxes on agriculture. He also abolished the laws defining a "category of offences known as 'criticism and evil talk'" on the grounds that when officials "do not dare to express their feelings in full," then the emperor "has no way to learn of his errors" and cannot hope to "attract worthy men from distant regions." This is one of the earliest instances of the epistemological argument for free speech.[103]

The heyday of Confucianism's influence was short-lived, however; its radicalism soon became inconvenient to those in authority. The Confucian theory of revolution, in particular, was a double-edged sword; it had been used to justify the overthrow of the Qin dynasty and the ascendancy of the Han, but now that the Han rulers were consolidating their hard-won hegemony, they found the doctrine less appealing. Wen's successor, Emperor Jing (Ching)—a ruler under whom many things began to take a turn for the worse—advised scholars that further discussion of that particular doctrine could be perilous to health and longevity.[104] Legalists began to return to positions of power and influence; they were so much better than Confucians at saying things that rulers wanted to hear. Confucians who stuck to their principles found themselves fighting a rearguard action and becoming increasingly irrelevant. Those who were more flexible could join the privileged class of Confucian bureaucrats created by Jing's

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[102]Sima, *Han Dynasty II*, p. 440.

[103]Sima, *Han Dynasty I*, pp. 290, 301, and 296. Sima sometimes makes it sound as though Wen embraced all these measures spontaneously, out of virtue, but at other times he makes clear that Wen often had to be prodded and shamed by his Confucian advisor Zhang Shizhi (Chang Shih-chih) into adopting them. Still, Han Emperors were proddable and shameable, which is more than can be said for their Qin predecessors. See Sima, *Han Dynasty I*, pp. 290–301, and 470–71.

[104]Sima, *Han Dynasty II*, pp. 363–64.

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successor, Emperor Wu (2nd c. BCE)—a ruler notable for having ordered the castration of the irrepressible Sima Qian. (Sima's crime was "deceiving the Emperor," that is, giving him advice he didn't want to hear.) Before long, Confucianism had been tamed, and largely fused with its old rival, Legalism. The Confucianism that became the official state philosophy for most of China's subsequent history was a new Confucianism, friendlier to state power and more hostile to the market.

The *laissez faire* policies of the Han's early years did not last. In the 1st-century BCE "Discourses on Salt and Iron," we learn what was beginning to take their place:

> In antiquity, to accomplish things by virtue was the honored way, while employing military means was despised. Confucius said: "If remoter people are not submissive, all the influences of civil culture and virtue are to be cultivated to attract them. . . ." Now we are abandoning ethics and relying on military force, raising up armies to attack them, placing garrison forces on the borders to defend against them. We expose our soldiers to dangers, station armies off in the wilds, and maintain these for long periods. The transport of provisions for them will be unending. Without, we make our soldiers on the frontiers endure hunger and cold, while within the country the common people must toil and suffer. We have established salt and iron monopolies that have now enlarged the profit [to the state], and the offices of government use that to sustain [the military]; that is not a good policy.[105]

The "Discourses" continue this idea:

> When laws and commands are many, the people become uncertain about which [forbidden action] they should be avoiding. . . . The laws of Ch'in [= Qin] were as profuse as autumn tendrils and their network was as thick as congealed tallow. Yet higher and lower were alike in evading them, so treachery and deceit burgeoned. . . . Now, today, the regulations and commands run to over a hundred articles; their text is voluminous, and the crimes they define carry heavy penalties. The way the provinces and constituent states apply them gives rise to doubt and uncertainty; whether transgressions shall be considered slight or serious is up to the officials. Even those versed in their meanings do not know how to apply them, all the less so do the simple people. The texts of the regulations and commands lie gathering dust and being eaten by bookworms on the office

[105]Quoted in Hsiao, *From the Beginnings to the Sixth Century A.D.*, pp. 458–59.

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> shelves. The officials cannot read them all, and all the less can the simple people do so. This is why law suits grow ever more numerous and why infractions committed by the multitude are ever more manifold.[106]

In these words of protest, an embattled cadre of 1st-century BCE Confucians bore witness to the accelerating pestilence of a swollen imperial state that had been conceived in liberty two centuries earlier. They speak for us.

APPENDIX: TRANSLITERATIONS

Wade-Giles	Pinyin	Latin
K'ung-fu-tzu	Kongfuzi, Kongzi	Confucius
Meng-tzu	Mengzi	Mencius
Chang Shih-chih	Zhang Shizhi	
Chia I	Jia Yi	
Ch'in	Qin	
Ching	Jing	
Chou	Zhou	
Chuang-tzu	Zhuangzi	
Han Fei-tzu	Han Feizi	
Hsü-tzu	Xuzi	
Hsün-tzu	Xunzi	
Kao Tsu	Gaozu	
Lao Tan	Lao Dan	
Lao-tzu	Laozi	
Li Chi	*Liji*	
Mo-tzu	Mozi	
Pao Ching-yen	Bao Jingyan	
Ssu-ma Ch'ien	Sima Qian	
Tao Te Ching	*Daodejing*	
Yen T'ieh Lun	Yantielun	

[106]Quoted in Hsiao, *From the Beginnings to the Sixth Century A.D.*, p. 466.

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AGAINST LIBERTARIAN LEGALISM: A COMMENT ON KINSELLA AND BLOCK

Frank van Dun*

What follows is a comment on some of the arguments on intellectual property and blackmail presented respectively by N. Stephan Kinsella and Walter Block in their contributions to the *Journal of Libertarian Studies* "Symposium on Applications of Libertarian Legal Theory."[1] While I am in broad agreement with most of what they say, there are some things with which I cannot concur. My reason for writing this comment, however, is not to express my disagreement on a few specific issues. After all, etching in the fine points of libertarian jurisprudence on blackmail or intellectual property is hardly a pressing need. Rather, I believe my disagreement on those small matters critically involves the very basis on which Block and Kinsella chose to erect their legal arguments. I am referring to their use of the so-called Rothbardian non-aggression rule as the foundation or axiom for libertarian jurisprudence.

According to Rothbard:

> The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the "nonaggression axiom." "Aggression" is defined as the initiation of the use or threat of violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.[2]

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[1]N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 1–53; and Walter Block, "Toward a Libertarian Theory of Blackmail," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001), pp. 55–88.

[2]Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1978), p. 23.

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The purpose of my comments is to explain why I think that this axiom is inadequate from a libertarian point of view. Accordingly, I shall not discuss intellectual property rights or blackmail as such, but will concentrate on those arguments of Kinsella and Block that most clearly reveal the weaknesses of their legal system, as I understand it.

After further introductory remarks, I shall first assess Kinsella's arguments against the legitimacy of trademark protection. I shall argue that, if pressed to their logical conclusion, they would make the very idea of a contractual order and therefore of a free market incoherent. I shall then turn to an appraisal of Block's arguments concerning libel and labour contracts. It is my contention that they lead to results that are incompatible with the requirements of freedom and justice that define the libertarian perspective on human relations. Like Kinsella's exposition, Block's discussion reveals an unpalatable legal formalism (or legalism). His treatment of libel abstracts from questions of personal responsibility in situations involving complex "social causation."[3] His treatment of labour contracts likewise abstracts from the real world situations alone in which contracts make sense. It seems to legitimise only a world in which every possible contingency must be covered by an explicit contractual stipulation. While such a world is perhaps a lawyer's paradise, it is arguably not the sort of place that a libertarian would cherish. Moreover, it is unclear whether it is even conceivable as a place where real human beings can live.

In the final section, I shall endeavour to show briefly where the so-called non-aggression axiom fits in a libertarian philosophy of law. I believe that an appreciation of its proper place will help us to avoid the mistakes of the libertarian legalism of our two authors.

No Non-Aggression Axiom

Non-aggression is an important and valid rule of libertarian jurisprudence. However, it is only so by implication, not because it is the defining axiom from which everything else is supposed to follow. Because the non-aggression rule is an implication of my philosophy of law, there is a whole range of issues with respect to which I reach

[3]I use quotation marks around "social causation" because I am well aware that this is a very complex and tricky concept and because I do not intend to burden this comment with an investigation of that concept. I am claiming only that there is such a thing as one person causing another to do something without actually using compulsion or force to make him do it and without having him agree to a contractual obligation to do it.

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the same conclusions as those for whom it is *the* axiom of libertarian legal theory. On the other hand, because it is only an implication, its meaning and significance are to be determined within the context of the system of which it is a part.

I have no problem with the thesis that, in a libertarian legal order, no individual or group—least of all those who are engaged in the administration of justice—should aggress against any person or any person's property. Aggression, in the libertarian sense of the word, is the physical invasion of another person's domain without that person's consent and without lawful justification. As such, aggression is unlawful and should therefore be illegal in a libertarian legal order (because such an order is intended to be as true to law as is humanly possible). Nor do I have a problem with the thesis that violent border crossings are lawful and therefore legally permissible if and only if they are committed in self-defence, to bring a criminal to justice, or to exact restitution or compensation for an unlawfully inflicted harm. They are permissible to the extent that they are themselves compatible with the requirements of justice.

My differences with Kinsella and Block stem from the fact that it does not follow from those theses that defensive use of force is justified or lawful only in response to aggressive violent invasions of persons or property. It does not follow that *only* aggression against another person or his property is unlawful. There may be unlawful acts that are not invasions of a person's physical domain, yet justify the defensive use of force to prevent, stop, or exact compensation for such acts.[4]

To be sure, one may posit non-aggression as the axiom of a libertarian legal code. However, one can hardly maintain without further argumentation that no legal code can be libertarian if it does not start from that proposition. At any rate, I have yet to see a convincing proof that non-aggression is the only axiom that yields a coherent conception of justice. Besides, I have reasons—not just hunches—for believing that we shall never get such a proof. There is no inconsistency in the belief that force may be used lawfully in defence against unlawful acts that are not physical invasions of person or property. Yet Block and

[4]Alternatively, one may broaden the concept of aggression to include acts that are non-invasive in the physical sense of the word, thereby changing the very meaning of the non-aggression axiom. However, I shall continue to use the word aggression in the traditional sense of a physically invasive, non-defensive use of force (violence) against another person or his property.

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Kinsella proceed with their arguments on the supposition that such acts are not unlawful *because* they are not aggressions. Accordingly, they also suppose that the use of force in retaliation against such acts must itself be an aggression, and therefore unlawful. In their system of thought, the dichotomy of aggression and non-aggression coincides with the logical opposition between unlawful and lawful acts.

The libertarian notion of aggression is a broad one, and does not have any connotation of malicious intent or even conscious action. Even an unintentional, accidental, physical invasion of another's property may count as aggression. If my dog strays from my yard and kills one of your chickens, the non-aggression rule would apply. Something that belongs to me has physically invaded your domain without your consent and without lawful justification.[5] That invasion was

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[5]Since this is not a treatise on libertarian jurisprudence, there is no need to qualify this statement here. However, if it were asserted in the manner of libertarian legalism, it could be taken as a starting point for serious criticism of that position. I am sitting in my garden, enjoying a cigar. A few particles of smoke drift over the hedge into your garden. Is that an invasion of your property? Is it an invasion only if the particles reach your nose or eyes? On a too literal (legalistic) interpretation of "border-crossing" it would be an "invasion" in any case.

Murray Rothbard, however, wisely cut short such an interpretation by insisting that "property" is a praxeological, not a physicalist concept. Consequently, one's property is only in "means of action," not in things as such. Thus, the borders to be crossed by an invasive action are those that define what Rothbard called "the technological unit," the size of which "depends on the type of good or resource . . . and must be determined by judges, juries, or arbitrators who are expert in the particular resource or industry." See Murray N. Rothbard, "Law, Property Rights, and Air Pollution," *Cato Journal* 2, no. 1 (1982), pp. 55–100, especially p. 84.

That technological unit is something objective within the world of human action. It is not, however, a spatially delimited sphere with a single border where every physical process (electromagnetism, sound or shock waves, the movement of smoke, dust or water particles, bullets, cars, dogs, or people) turns into an invasion. One type of invasion of some physical space may not be an invasion of the relevant technological unit, whereas another type of invasion of that space may well be an interference with the unit. In any case, the distinction between property as a technological unit and some absolute spatial boundary leaves us with a question: Could there be an interference with the technological unit without there being an invasion of some physically delimited space? If that is the case, the non-aggression rule cannot play the role Block and Kinsella reserve for it. Amazingly, given that both authors

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unlawful. I am responsible and liable for it, even if I neither foresaw nor intended nor in any way promoted any invasion of your property. You are entitled eventually to use force, if that should be necessary, to get the compensation that will undo as much as possible the harm you suffered from my unlawful border crossing.

NO TRADEMARKS?

Even with the broad libertarian notion of aggression, we do not have a logical warrant for saying that nothing but physical invasion can be unlawful. Kinsella's paper on intellectual property rights provides a good platform for a discussion of that point, most clearly so at the very end where he makes the claim that "trademark law should give consumers, not trademark users, the right to sue trademark pirates."[6] Kinsella's argument, refering to two fictional hamburger chains (RothbardBurger versus LachmannBurger), has all the appearances of an insider's joke for Austrian economists, which perhaps was all that Kinsella intended.[7] Nevertheless, an outsider like me should be forgiven for considering it as an argument on trademark law. After all, it uses the same strategy as Kinsella's other arguments to dispose of the idea that the holder of the trademark (R-Burgers) is unlawfully harmed by the trademark piracy committed by L-Burgers. Kinsella writes:

> It is difficult to see how this act of fraud, perpetrated by the Lachmannian on [the consumer], violates Rothbard's rights. The Lachmannian's actions do not physically invade Rothbard's property. He does not even convince others to do this; at most, he may be said to convince third parties to take an action within their rights, namely, to buy a burger from [him] instead of Rothbard.[8]

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are generally more than merely sympathetic to Rothbard, neither one refers to Rothbard's seminal exercise in applied libertarian legal theory.

[6]Kinsella, "Against Intellectual Property," p. 44.

[7]An author who claims to be a Rothbardian (or a Marxist or a Thomist) may be mistaken or he may willfully lie about the logical relations of his work to that of "the master." Surely, however, such an author is not in the same category as one that falsely claims to *be* Rothbard or Marx or Saint Thomas, or as one that falsely insinuates that the relevant master authorised or approved his work. The issue between LachmannBurger and RothbardBurger is, at best, analogous only to the latter type of misrepresentation. Is Kinsella suggesting that some Lachmannian economist is guilty of that?

[8]Kinsella, "Against Intellectual Property," p. 44.

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Yet, it is also difficult to see how trademark piracy could violate the consumer's rights if it was not a violation of the trademark holder's right. According to Kinsella, the consumer supposedly is defrauded because the L-Burger chain misrepresented itself to the consumer. The latter therefore should have a right to sue the L-Burger chain for "fraud and breach of contract."[9] That is a strange conclusion, for it is not at all clear what contract L-Burger breached. The consumer presumably got what he paid for: a burger. If L-Burger acted within its legal rights under the Kinsella Code in using the R-Burger trademark, the consumer should know that a trademark carries no legally relevant information.[10] Kinsella's argument—the consumer thought he bought an R-Burger, but instead got a crummy L-Burger—is simply irrelevant. The consumer's expectations would have been equally frustrated if he had bought at R-Burger when, unbeknownst to him, that chain had hired another chef with the same tastes as his counterpart at L-Burger or had changed its production processes or suppliers. Should any of these things also constitute a violation of the consumer's rights?

In any case, a lawyer for L-Burger would argue that his client had legally opened his restaurant as an R-Burger look-alike, but never had forced a customer to come in. A customer who enters a commercial establishment takes his chances on what it sells. *Caveat emptor* and all that! Moreover, while his client had indeed dressed his restaurant up to make it look like Rothbard's, he had never in any contract given a guarantee that his establishment was part of the R-Burger chain. So what contract did L-Burger breach? A fancier lawyer would even have added that, if such a guarantee had been given, it would have no more standing under the legal code than the trademark itself. Indeed, if the trademark is no guarantee of the identity of a party in an exchange, why should anything else be?

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[9]Kinsella, "Against Intellectual Property," p. 44.

[10]In an article on contract theory, Kinsella writes that "detrimental reliance" cannot be a ground for contract enforcement. The reason is the circularity involved in saying that enforcement depends on reasonable reliance on a promise, when reliance on a promise must consider the enforceability of the contract to be reasonable. N. Stephan Kinsella, "A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability," *Journal of Libertarian Studies* 17, no. 2 (Spring 2003). Whether that argument is good or bad, it implies that buyers should not rely on trademarks until they have made sure that the legal code will enforce the expectations they have formed on the basis of such marks.

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Is there a fundamental objection to regarding a trademark as similar to a person's signature, his personal mark for purposes of trade and other forms of communication? I cannot see one. Even if there was a fundamental difference, it would still be the case that a person that forges another's signature—using his own ink, pen and paper—is not *by that act alone* invading another's rights. Nonetheless, his forgery *should* become legally relevant as soon as he starts using it to misrepresent himself to the world as the person whose signature he has learned to forge. However, under the Kinsella Code, we should say that F (the forger) does not invade any right held by O (the person that F pretends to be). As far as his relations with O are concerned, F's forgery is not legally relevant. Yet, Kinsella implies that F violates the rights of those with whom he enters into contractual relations. What rights? Forging another's signature is a legal-because-non-invasive action. Surely, if that is a direct implication of the Kinsella Code, then anyone who is subject to that code must know that a signature carries no legally relevant information.

F's pretence must have started before the other persons entered into any contractual relation with him. If F acted within his rights in the pre-contractual stage of negotiation, then he also acted within his rights in the contractual stage and thereafter as well.[11] If it is legal to present oneself as someone else, then for others it is *caveat emptor* all the way down the line. They made a contract with F-pretending-to-be-O, and so long as that pretender does not commit breach of contract, they have no cause for complaint.[12]

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[11]F, pretending to be O, signs a contract with Kinsella. The latter, just to be on the safe side, asks F to identify himself and F gleefully shows him his identity papers. As we should expect, they are identical to O's, except for the photograph and the fact that F has carefully produced them himself with his own printing equipment on his own paper. Alternatively, Kinsella asks F to sign a document, stating that he (F) is O and not someone else. F signs the document willingly—putting O's signature under it. It is perfectly legal for him to do so. F is no fool. He knows that signing the document or printing false identity papers is no more a physical invasion of anybody's property than is signing the original contract. Nor is he breaking any contract, because there was no contract before he signed. There is no more fraud (from the legal point of view) in the second instance of misrepresenting himself than there was in the first.

[12]Kinsella could easily get out of this conundrum by adding to his code a rule stating that it is illegal to misrepresent oneself. However, that rule is no implication of the non-aggression axiom. Consequently, he would have to reconsider everything he wrote on intellectual property rights to check if it still

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Let us disregard the perils of fictional hamburger chains. We can see that Kinsella's attack on trademark law endangers the very idea of a free market. The threat it poses to the meaning and the significance of a personal signature already made that clear—but there is more. Suppose O is the owner of an industrial lab that provides quality control services. His quality control label is proudly displayed by the producers of goods that passed O's rigorous testing. However, under the Kinsella Code, anybody can print similar labels and sell them to anyone who wants them. After all, there is no trace of a physical invasion of anybody's property in using one's own printing equipment and paper to produce and sell printed patterns. In this case, surely, the people who buy the counterfeit labels will not complain. They know they are buying mere pieces of printed paper. To their customers, they do not sell the labels, but their own products under their own name. Their customers have no contractual relations with the producer of the counterfeit labels. (Perhaps the labels do mislead some of the customers, but again, *caveat emptor*!)

Then there is the question of money, at any rate money substitutes such as bank notes. Under the Kinsella Code, it is not illegal *per se* to counterfeit bank notes. After all, they are only pieces of paper with a trademark on them. The counterfeiter produces sheets of paper that merely look as if they were issued by a bank—but in doing so, he is using only his own paper and equipment. No physical invasion of anybody's property here! Moreover, in using the notes to buy things, the counterfeiter need not give any guarantee concerning their genuineness or authenticity. If they are good imitations, who is going to question the validity of the notes anyway? And if someone raises the question, there is no doubt that the counterfeiter will produce a certificate of authenticity—just another piece of paper with marks on it—in no time. Finally, is the counterfeiter not as free to exchange his property for goods and services as any of his trading partners? Surely it is immaterial under the Kinsella Code that his property includes things that are stamped with a genuine bank's trademark and look like a bank note in other respects. Of course, the real bank might refuse to recognise the notes and to pay out specie to a person who

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holds in view of the more complex code. More importantly, as a legal theorist, he would have to make sure that there were no other rules waiting to pop up. To do that, he would have to withdraw from doing "applications of libertarian legal theory" and return to the philosophy of law that is the source of that theory.

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presented them at its counter. However, even if it knew the counterfeiter, the bank could not act against him, for anybody is at liberty to use its trademark. Neither, it seems, has any note holder a legal ground for making a case against the counterfeiter. He should have known that everybody legally is at liberty to use anybody's trademark.[13]

Clearly, with signatures, bank notes, and quality labels—trademarks all—rendered legally irrelevant, the free market under the Kinsella Code is bound to hold more surprises in store than even the staunchest libertarian is willing to bargain for. Of course, in the end, it may not make much of a difference. Mankind is an inventive species, and its experience with circumventing legal codes goes back a long time. Nevertheless, the absurdities of that particular code are so glaring that I can hope only that I have profoundly misunderstood Kinsella's case against property rights in trademarks.

A central argument in Kinsella's article is that

> a system of property rights in "ideal objects" necessarily requires a violation of other individual property rights, for example, to use one's own tangible property as one sees fit. Such a system requires a new homesteading rule, which subverts the first-occupier rule.[14]

The argument certainly applies to patents. Under current legislation, a patent-holder may use institutionalised means of violence to prevent or stop another person from producing or doing anything that the patent legally protects. He does not have to prove that the other person committed an unlawful act, nor is it relevant that the other person can prove that he did not commit an unlawful act. However, with respect to trademarks, the argument is irrelevant. By identifying myself, I do not subvert anybody's right to use his property in any lawful way he wants. Nor do I interfere with his right to use his own property lawfully when I stop him from pretending to be me. True, he may be using his

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[13]Recently, Hans-Hermann Hoppe, Walter Block, and Jorg Guido Hülsmann wrote that issuing bank notes that are not fully backed by specie is an unlawful, fraudulent misrepresentation of money and should therefore be illegal. See their "Against Fiduciary Media," *Quarterly Journal of Austrian Economics* 1, no. 1 (1998), pp. 19–50. I do not know where Kinsella stands on the questions raised in that paper. However, his present discussion seems to imply that if anybody may duplicate a bank's trademark *ad libitum*, then certainly the bank itself may use its own paper and ink to multiply its notes as much as it wants.

[14]Kinsella, "Against Intellectual Property," p. 44; see also pp. 31–33.

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own tangible property—paper, printer, and ink—to misrepresent himself as being me (or me as being him), but that is insufficient ground for holding that such misrepresentation is lawful. If the non-aggression axiom commits us to hold that it is lawful, that only proves that the axiom fails to distinguish properly between lawful and unlawful acts.

Kinsella has another important argument. He notes that intellectual property rights "create scarcity where none existed before."[15] Again, this works well with patents, but it does not have any bearing on trademarks. When I use marks of identification, such as a signature and a trademark, I do not create an artificial scarcity. However, the counterfeiter or trademark pirate does create an artificial abundance —that is, the illusion of abundance—where no such abundance exists.

Let me sum up. The problem with Kinsella's discussion is that it implies the reduction of the praxeological analysis of purposeful and meaningful human action to a behaviourist analysis of mere movements and signs. Under the Kinsella Code, I do not own my signature and I do not own my trademark. I do not have a legally relevant identity and cannot own any identification. I can only own pieces of paper and the ink that I have used to make marks on them. I leave it to Kinsella to wonder what that is supposed to imply about the status of self-ownership and title-transfer.

Legal Libel?

Walter Block's analysis of blackmail rests on the same interpretation of the non-aggression axiom as does Kinsella's treatment of intellectual property, leaving it vulnerable to a similar critique as Kinsella's. However, it brings to light certain other shortcomings of a legal theory that neglects to take praxeology seriously and opts instead for a behaviourist approach. Accordingly, I shall comment on it without reference to what I said about Kinsella's analysis of trademarks.

Under the libertarian legal code, writes Block:

> People would be free to do whatever they wished, without limits, except that they would have to respect everyone else's right to do the same. They could do this if and only if they refrained from initiating or threatening violence against another person or his property.[16]

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[15]Kinsella, "Against Intellectual Property," p. 23.

[16]Block, "Toward a Libertarian Theory of Blackmail," p. 55.

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If there is "no equivalent to the initiation of violence against person or property, [then] no libertarian law would have been violated."[17]

I shall limit my comments on Block's paper to two of the cases that he discusses. The first of these involves libel or falsely accusing another person of a crime.[18] Block quotes Murray N. Rothbard in support of his thesis that libel is not a crime according to the libertarian code:

> Smith has a property right to the ideas or opinions in his own head; he also has a property right to print anything he wants and disseminate it. He has a property right to *say* that Jones is a "thief" even if he knows it to be false, and to print and sell that statement.[19]

That makes sense *if* we accept that *only* physical invasions of another's person or property are unlawful.[20] Still following Rothbard, Block notes that there is no merit in the argument that to make a false accusation against a person is to ruin or damage the latter's reputation. In fact, that often happens when the false accusation is made in public, for example in a newspaper or on radio or television. However, a person's "reputation consists of the thoughts of many people about him . . . and thus cannot be owned by [him]."[21] Of course, that is true, but is it relevant? Is the relevant question really whether saying something about a person is a physical invasion of that person or his property? Or is the relevant question whether it is lawful to accuse a person

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[17]Block, "Toward a Libertarian Theory of Blackmail," p. 59.

[18]I am willing to concede to Block what he says about gossip and spreading rumours. However, to accuse a person of a criminal (unlawful) act, knowing that the accusation is false, is to me a different matter.

[19]Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), p. 126, quoted in Block, "Toward a Libertarian Theory of Blackmail," p. 63.

[20]Block is less than consistent, however. In Block, "Toward a Libertarian Theory of Blackmail," fn. 20, he further quotes from Rothbard, *The Ethics of Liberty*, p. 126: "[I]f your son is at sea where he cannot be reached, and I tell you that I am holding him captive and ask for funds to secure his release, this too, is an example of 'mere' speech constituting a criminal border crossing." What border crossing? Do I not have a property right to *say* that I hold your son in my power, even if I know that to be false, and to print and sell that statement? I have not invaded—in fact, I do not even intend to invade —anybody's property. If you foolishly believe otherwise, isn't that your responsibility?

[21]Block, "Toward a Libertarian Theory of Blackmail," p. 63.

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of some crime, knowing that the accusation is false? Only by asserting that the non-aggression proposition is the axiom of any libertarian legal code can we dismiss the second question on no other basis than that we have an answer to the first.

While it is true that one cannot own one's reputation (that is, other people's opinions about oneself), it is also true that one can sell one's reputation. It happens all the time when businesses are taken over, in advertising campaigns, or when the retiring author of a comic strip sells the right to the continued use of his name to his successor. How can one sell what one does not own? The fact is that one cannot do so. But then in selling his reputation, a person is not selling other people's opinions about himself. He is selling a particular use of his name or trademark, which, like all other commodities, has market value because of other people's valuations and opinions. They are things he *can* own, Kinsella notwithstanding. However, that it is not unlawful for others to use his name or trademark in various ways does not mean that it is lawful for others to use those things in every way they want. Therefore, it is not a foregone conclusion that using another's name in making false accusations (against him or a third person) is *never* an unlawful act.

Block reveals how shaky his analysis is, even from a libertarian point of view, when he writes that, under the Block Code, making a false accusation is perfectly legal. Apart from the fact that making an accusation is only a non-invasive speech act, he notes that "in a libertarian world, each person is responsible for his own acts."[22] Again, that is unobjectionable in itself, but it does not follow that if an action consists of different parts, each of which is performed by different persons, the performance of one part completely exonerates those who performed an earlier part of the series. Yet, that is precisely what Block suggests in his discussion of the libeler:

> If the police or the courts foolishly trust the [libeler's] statement [about his victim, and accordingly convict the latter for what he is falsely accused of], it is their responsibility. They will have engaged in an unwarranted border crossing, and, when the truth gets out, they will have to pay the appropriate penalty.[23]

As soon as the police or the courts enter the picture, the malicious informer is gone from it!

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[22]Block, "Toward a Libertarian Theory of Blackmail," p. 64.

[23]Block, "Toward a Libertarian Theory of Blackmail," p. 64.

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Several comments are in order here, apart from the obvious one that, by the time the truth gets out, irreparable damage may have been done. The victim or the "foolish" police and judges may be dead, for example. On the other hand, it would be irrelevant whether the accuser is still alive, as, under the Block Code, he would be safe in any case. By the time the truth comes to light, hundreds—even millions—of people may have contributed to the ruin not just of the innocent victim's reputation but of his life and fortune. They may have come to accept the justice of the accusation and the ensuing conviction, or to feel so embarrassed by the events of the past that they no longer have any interest in the truth.

As for the other comments, first, we should not just consider the case where the police or the courts *foolishly* trust the libellous statement. They can be conned expertly, and, when they are, it is not self-evident that they should be punished for what was, after all, a job competently done. Should we conclude, then, that a person that has been accused falsely and framed adroitly should not expect justice under the Block Code?

We should not expect infallible police or courts, even under a libertarian code. Moreover, since Block rightly holds that the police and the courts should be unprivileged private institutions, he should—and, of course, does—know that providers of such valuable services would hedge against the risks involved in their profession. They certainly would insist on a clause in their contract to exonerate them for any mishaps that might occur despite their best competent efforts to serve justice. I am willing to bet that they would announce severe retaliation against anyone trying to use them under false pretences or for unlawful purposes. For that reason, surely, false accusations rarely will be made to well-established police or court-services. The providers of such services have to rely on good will, that is, on their reputation.

However, under the Block Code, it is apparently perfectly legal to attempt to ruin their reputation by making false accusations 'in the court of public opinion' (which does not operate under mutually agreed to contracts). Once such smear campaigns get under way, anything can happen. For example, there could be an opening for new entries into the market for judicial services. The newcomers presumably would want to establish credibility quickly by announcing their affinity to the current swings of public opinion. The established courts might feel that they could only survive by doing the same. Rather than courts with a reputation for judicial probity, we might see courts with a reputation

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for being in tune with what people think and want. Is devolution into populism part of the libertarian deal?

Second, suppose the court acquits the victim of the false accusation. Do truth and justice prevail? Not under the Block Code! Even under that code, the criminal justice system presumably requires proof beyond the shadow of a doubt to convict a person. Thus, an acquittal still may leave the innocence of the accused person shrouded in doubt. So why should all those people who actually believed that the accused was guilty as charged suddenly give up their belief? Why should they leave him alone rather than give him the hell that they believe he so much deserves? How likely is it that the author of the false accusation would end his campaign of defamation merely because a court acquitted his target? Sometimes, under such circumstances, an acquittal is a worse fate than a conviction.

Admittedly, public opinion may go any way under any legal system. However, under the Block Code, the victim of a false accusation is not even permitted to defend himself against it in a regular way. The code does not permit him to challenge the authors of the false accusation to prove in a regularly conducted trial that they have enough incriminating evidence to make the accusation stick. Yet, that is an effective way to bring out the truth at an early date, for the falsely accused person is applying strong pressure (the threat of punishment or at least compensation for damages) to his accusers to reveal what they have. At the same time, he is giving a strong signal to public opinion: I am not afraid of those guys; I am willing to give them a forum in which *I* have to prove beyond a shadow of a doubt that they are frauds. Surely, one who is rightly accused of a crime is unlikely to provide such a forum to his accusers. Even if *they* fail to make their case, he must fear that enough of the truth may come out to draw the attention of more competent investigators.

Without the possibility of thus redeeming himself, the falsely accused person has no defence but to retaliate in kind—better yet, to get there first. As Hobbes put it: "And from this diffidence of one another, there is no way for any man to secure himselfe, so reasonable, as Anticipation."[24] Just imagine what would become of commercial advertising if the Block Code would be implemented! The misinformation, mudslinging, and accusatory partisan "science" we now associate primarily with politicians, consumer advocates, and other irresponsible "nonprofit" types would become a condition of commercial survival: *Accuso,*

[24]Thomas Hobbes, *Leviathan* (Oxford: Clarendon Press, 1968), p. 95.

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ergo sum. Not to join the fray is then like insisting on being a lamb when everybody else is doing his best to be a wolf.

With everybody calling everybody a liar, people will soon become so distrustful that they will not believe any accusation, true or false. Assuredly, Block is right to suggest that that is effective protection against libel and the loss of reputation—but only because nobody can lose a good reputation in a situation where nobody has one (because nobody is trusted to have one). More importantly, the general acceptance of the idea that any accusation is probably false, is also the best protection for any kind of wrongdoing.[25]

Third, Block studiously refrains from saying that when the truth comes out, it is the person that made the false accusation who should be penalised. Indeed, that is the whole point of his discussion: making false accusations is legal. Nevertheless, when the truth comes out, we *know* that that person initiated the proceedings that led to the violent invasion of the innocent victim's life or property. Maybe the police's or the court's "foolishness" (if there was any) was a contributing factor, but it was not the main cause. Moreover, under Block's principle, it is not clear what the courts have to do with the matter in any case. The judge merely renders a verdict. If the people who run the jails or work the gallows foolishly trust the judge's words, isn't it their responsibility? Shouldn't they be the people who will have to pay the appropriate penalty, if and when the truth comes out? After all, being responsible for their own acts, they could have refused at any time to participate in the crime of punishing an innocent person. Instead, they actually carried out the punishment.

Here, too, Block is relying on Rothbard to push the responsibility (and the blame) for a complex action all the way down to the last person in the chain. "Inciting to riot," Rothbard writes, "is a pure exercise of a man's right to speak without being thereby implicated in a crime."[26]

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[25]There is, then, a serious risk of a slide into a "Hobbesian equilibrium" of generalised distrust or even paranoia. Any departure from that equilibrium is bound to be "self-correcting" because, under the Block code, it merely means that there is some amount of trust that can and will be abused. The guardians of libertarian legalism will point their finger at the trusting person and reprimand him for his complaints. After all, he has only himself to blame for trusting another person!

[26]Rothbard, *Ethics of Liberty*, p. 126, quoted in Block, "Toward a Libertarian Theory of Blackmail," p. 63.

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One does not have to be a supporter of the fashionable anti-racism laws that are the paragons of political correctness in Europe today to see that Rothbard's position is no valid expression of a concern for justice and freedom. Such laws do infringe on vital liberties, not only on free speech, but what is wrong with them is precisely what is wrong with Rothbard's rule—both suffer from an obnoxious inability to recognise crucial real differences in real situations. Suppose a million individuals, each of them sitting alone in his room, read a phrase in a book filled with hate-speech. If any one of those readers were to get so excited by his reading that he would commit some gruesome crime, the author of the book would not be implicated. That very same phrase, shouted at the top of one's voice in front of an excited crowd of, say, fifty or five hundred people, is an exhortation that in the circumstances is meant—and is likely—to start the execution of a crime. The political correctness crowd assimilates the former to the latter situation and accordingly wants to persecute the author as well as the demagogue on the soapbox. Rothbard and Block assimilate the latter to the former situation and accordingly want to exonerate the agitator as much as the author. They are making the same mistake.

The "brain" of a violent gang is as much involved in its crimes as is the slow-witted henchman that actually rips out the door and throws acid in the victim's eyes—only more so. Hitler, Churchill, Roosevelt, Stalin, and their likes were not innocent practitioners of free speech at a time when a lot of their compatriots were blowing up towns and villages and people. The general who, in his search of scapegoats for a defeat, sends a handful of privates to the firing-squad is not exonerated by the fact that some other privates actually fired the shots that killed their convicted colleagues.

People have no difficulty finding differences where there are none, yet few are likely to believe a progressive lawyer who argues that, while his client admittedly did aim his gun at the victim and pulled the trigger, it was the bullet that killed the victim. "My client was only engaging in the legal activity of holding a gun and moving his limbs. People don't kill, bullets do. Let us ban ammunition." Ronald Reagan and Charlton Heston, experts at firing blanks, knew better. We should also know better than Rothbard and Block. It really does happen that generals and political and other leaders kill through their mastery of the use of the breathing kind of "live ammunition."

Libertarian legal theorists should not dissolve human action into merely behavioural components, assigning legal relevance only to the

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last component (or shifting it only as far as formal contractual stipulations allow). If the man that performed the last part of a complex action by his act alone really exonerated all those who performed an earlier part, then he should also be the only one to receive credit for the completed action. Especially from libertarian legal theorists who also are eminent Austrian economists, we should not expect a theory that implies that only the worker who puts the finishing touch on a car before it is ready for sale to the final consumer is responsible for the whole machine. Of course, Block would say that this analogy is misplaced because the worker is under contract, whereas the rioters presumably were not under contract to the agitator. However, is it really only the fact that the worker is under contract that stands in the way of his claiming title to whatever the market is prepared to pay for the car?[27] Who should take credit for the poem: the blind poet, or his girlfriend who lovingly typed the manuscript (which she could have refused to do)? And if the blind poet really is the author of the poem, why should the rabble-rousing demagogue not be the author of the riots he incites?

Why should we require libertarian judges to turn a blind eye to real processes of "social causation" when we know that advertisers, educators, politicians, and agitators are very much aware of them—and willing to use them for their purposes? It is not just in a libertarian world that each person is responsible for his own acts; it is true in every world. However, we should not take that as an excuse for disregarding the complex causal processes that go on in the real world, whatever legal code is in force. A libertarian judge has to confront the facts. Reality does not yield to theory. It is all right for a judge to remind a man charged with participating in a violent mob that he is responsible for his own actions, but only after he has determined what the man's own *actions*—not merely his bodily movements—really were. If the man was forced (coerced, compelled) by another to participate, we have one sort of case. If he got paid to smash windows, we have another sort of case. If he was manipulated in any other way, surely we cannot just pretend that then everything was the same as if he was not manipulated in any way—and treat the manipulator as if he was just an innocent bystander.

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[27]In Block's example of a false accusation, we should assume that the judges (being judges in a libertarian society) were under contract to the person making the accusation. Apparently, however, that circumstance does not protect them in Block's view from being saddled with responsibility and liability for the whole mess created at the false accuser's instigation.

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A legal code that does not make allowance for the facts of the real world only serves the cause of injustice. Whether we like it or not, human beings are what they are. They are not angels and they can be manipulated. What benefit in terms of justice can we expect from a code that insists that skilful agitators, who are smart enough to stay clear of formal contracts and not to dirty their own hands, should be immune from legal sanctions? What benefit in terms of justice is to be derived from a code that insists that making false accusations is perfectly legal when we know that such accusations are extremely likely to cause innocent persons much harm and suffering? True, from a behaviourist point of view, making a false accusation is merely the non-invasive action of uttering certain sounds; but then, from that same point of view, shooting a person is only the non-invasive action of squeezing a piece of metal.

FREE TO FIRE?

Let me briefly discuss another of Block's cases. "Should it be legal," Block asks, "to fire an employee who refuses to sleep with the boss?" His answer is an uncompromising *yes*. "It is always legitimate to fire an employee for any reason at all, at any time, assuming that there is no long-run contract in force precluding this option."[28] Let us admit this. Still, there is the question of damages. Are we really to suppose that in a libertarian world, a judge will be satisfied to quote Block in dismissing the case brought by a secretary against her employer who tried to blackmail her into sleeping with him? I do not think so.

In no world, whether libertarian or not, do labour contracts (or any other contracts) exist in a vacuum. Contracts are meant to facilitate human intercourse, not to replace the real world with a hermetically closed, artificial universe in which everything is governed by fully explicit rules (as in a board game, such as chess). Most contracts, indeed, are very simple agreements made by people who do not bother to insert clauses for every possible contingency that might arise. Even complex explicit contracts—such as those that are involved in organising a corporation—are unintelligible to anyone who is unfamiliar with the vast store of common experience, expectations, and presuppositions that the parties never made explicit. If ever the need for it arises, such things are brought into the open then and there. At that

[28]Block, "Toward a Libertarian Theory of Blackmail," p. 65.

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moment, it may still transpire that there really was no agreement about those things, although all the parties to the contract thought there was. In most cases, however, the judges will not look kindly on attempts by any party to impose ex post some fanciful interpretation on one or more of those implicit background clauses that people reasonably could take for granted.

Any judge, therefore, must take seriously the important qualification to Block's free-to-fire rule, namely "that there is no long-run contract in force precluding [the option to fire an employee at will]." To do so, however, the judge must look not only at the explicit terms of the contract but also at the real situation in which the contract was made. That is where he will have to look if he wants to know what may be presumed to be a part of the contract even if it was not stated explicitly. The essential point is that he *must look* and not pull the facts out of his sleeve or the legal code. So what will the judge find? There is little chance that he will find that prospective employees expect and agree to dismissal at any time, for any or no reason at all. The judge cannot simply presuppose their agreement to that condition *as a matter of legal principle*. If he could do that, he could just as well turn the table. As a matter of legal principle, he would then declare, every prospective employer agrees never to fire an employee for whatever reason, unless he explicitly stipulates the grounds for dismissal in the labour contract.

I bet that even in a libertarian world, no judge will interpret the labour contract between the employer and the secretary in the way Block suggests. If Walter Block were a judge in a libertarian world, he would be out of business in no time if he thought a contract was a "text" and nothing more. The employer who tells his secretary that she should consider herself fired unless she agrees to sleep with him is trying to get her to do something she did not contract for. We must be in the realm of science fiction if we can safely assume that any person who takes on secretarial work understands that this involves satisfying the boss's sexual desires.

Suppose a worker is hired to lift crates that weigh twenty pounds each. After a while, his employer tells him that unless he agrees to lift crates that weigh fifty pounds each, he will be fired. If that is an offer to renegotiate the labour contract or else terminate it, no objection can be made. But it does not look like such an offer. It looks like an attempt to unilaterally change the explicit terms of the contract. If that is the case, a judge—especially, I should say, a libertarian one—will not just

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consider that an employer is free to hire and fire at will. That rule is not the issue here. The issue is whether the labour contract implies that the employer can unilaterally change its terms without violating the contract he has with the worker.

Block's rule seems to imply that a labour contract imposes no restrictions on an employer who is smart enough to add "Or else you are fired" to every demand he makes. It seems to imply that every labour contract must be understood to contain an "anything goes" clause in favour of the employer. Now it might seem that if that were indeed the standard understanding imposed by the legal code, it would not matter, because people still would have the option to make explicit in their contracts whatever they want. However, that "Coasian move" would not change the fact that a person seeking employment would have to be virtually prescient about any demand the employer could make, if he is to know what he is committing himself to in signing a contract.

Rather than a consistent application and guarantee of the principles of freedom in the real world, Block's rule is truly a Lawyers' Guaranteed Employment Act. The mechanical application of the so-called non-aggression axiom that he favours would affect not only labour contracts but all other contracts as well. It would ensure that no person could get through the day without the assistance of an army of lawyers to draw up and revise contracts of unimaginable complexity. Your survival and fortunes in a libertarian world would depend on how smart your lawyers are compared to those of others. I am sure that is not what those who are drawn to libertarianism are bargaining for. Why try to escape from the labyrinth of regulation and red tape of statist societies if it only will land you in a maze of small print?[29]

[29]The libertarian legalist's answer is, of course, that the regulations and the red tape are coercively imposed whereas the small print is freely agreed to. However, it is the libertarian legalist's code that compels you to devote all your resources to getting the small print right. If you don't, the application of that code will force you to do or accept things that you really did not contract for but simply did not foresee or expect. After all, the libertarian legalist will say, you should not trust anybody. If you are foolish enough to assume that others are trustworthy, you have only yourself to blame!

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BACK TO BASICS

As I see it, the trouble with Kinsella's and Block's libertarian legal theory has its immediate roots in the elevation of the non-aggression rule to the status of the one and only axiom of legality. Physical aggression—initiation of violent, invasive action—against another person or his property most certainly is a paradigmatic case of unlawful action. I wholeheartedly admit that, for many purposes, the non-aggression rule will do. Nevertheless, it does not follow that such aggression is the *only* type of unlawful action, and therefore the only type that should be ruled out by a libertarian legal code. We can understand that in authorising the use of violence in the endeavour to combat any form of unlawful action or injustice, one wishes to err on the side of safety. However, bending over backward to make sure that the application of the legal code is not itself a source of injustice has its risks, as we have seen. I do not mean only the risk of falling over on one's back—which seems to be Kinsella's fate. Those who bend over backwards are just as likely to end up looking at the sky, which is not the place where most injustices occur. That, I think, is the problem with Block's discussion of blackmail.[30]

I am not going to take this opportunity to elaborate on the foundations of my philosophy of freedom and justice. However, I must say something so as not to leave the reader with the impression that all of the above comments are merely ad hoc.

A libertarian legal theory must be founded on a sound philosophy of law if it is to have any chance of holding its ground in serious intellectual debate. Block and Kinsella do not provide such a philosophy. They assume instead that it can be found in Rothbard's writings, especially *The Ethics of Liberty*. At any rate, they presuppose the validity of Rothbard's theory of law. However, in his *Ethics of Liberty*, Rothbard explicitly warned his readers that he himself was merely presupposing the validity of the theory of natural law and would not attempt "a full-scale defense of that theory."[31] For that, he referred

[30]Apart from Kinsella's and Block's articles, the "Symposium on Applications of Libertarian Legal Theory" published in the *Journal of Libertarian Studies* also has a contribution by James Ostrowski, "The Rise and Fall of Jury Nullification," pp. 89–115. Although Block gives us no indication about the standing or even the possibility of trial by jury, *a fortiori* of jury nullification, we may well wonder how Block's legal theorems on libel and labour contracts would be dealt with by juries claiming the right to judge legal rules.

[31]Rothbard, *Ethics of Liberty*, p. vi.

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to what unspecified "ethical philosophers" had "ably expounded and defended elsewhere." There is, to be sure, a lot in the literature on natural law that should warm the heart and stimulate the brain of any libertarian. However, there is precious little (if any) evidence that it was only lack of logical acumen that kept the authors of the natural law tradition from discovering that a rigorous application of the Rothbardian non-aggression axiom would solve all questions of law. In any case, Rothbard presupposed many things in his exposé of applied libertarian ethics. I believe we have to take those presuppositions seriously. They provide the context within which the non-aggression rule can be applied properly.

Natural law is, of course, the place to start. It is unfortunate that most people by now have succumbed almost without reservation to the positivist delusion that "law" means "legal rule." This makes it hard to give a sensible meaning to the expression "natural law." It is hard to think of a rule—especially a rule of conduct—as something natural. However, the word "law" primarily means order, and order can be natural.[32] Even if we think only of the order of the human world, we can still make sense of the notion that there is a natural order of the human world.

An order is basically a system in which things can be distinguished clearly and systematically. A natural order, then, is a system in which things can be distinguished clearly and systematically on the basis of objective, natural qualities, properties and relations. Natural law, which is our concern here, is a system in which human agents can be distinguished clearly and systematically on the basis of their objective, natural qualities as different yet similar, separate yet interacting natural persons. In short, it is an order of natural persons.

The fundamental presupposition of the natural law approach is, of course, that it is possible to distinguish between any two human persons on the basis of their objective natural characteristics. The core of natural law theory—which will not become visible until we have weeded out the overgrowth of metaphysical and theological notions that has burdened it throughout the ages—is that the human world is in order so long as human beings respect the natural distinctions that define it. They are the distinctions that mark the boundaries between any two

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[32]See my article "The Lawful and the Legal," *Journal des Economistes et des Etudes Humaines* 6, no. 4 (December 1995), pp. 555–79; also see my "The Logic of Law" (forthcoming).

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human persons, their bodies, actions, words and works. They are the distinctions that make it possible for us, at least in principle although not always in practice, to say of any body, action, word, or work, that it is this or that person's body, action, word, or work.

Thus, from the perspective of natural law, it is possible to classify *human actions of whatever kind*—not just those that can be fully described in physical terms—as either lawful or unlawful. The decisive criterion is whether, in performing an action, a human being does or does not respect those natural distinctions between himself and other persons, or between any two other persons. To put it differently, we can distinguish actions that maintain, strengthen, or restore the natural order from actions that cause confusion in the human world. Actions of the latter kind cause "war" (a Germanic word meaning confusion, the inability to distinguish one thing from another) and eventually the total breakdown of the order of the human world ("war" in the usual sense). Such an action makes it difficult, even impossible, to tell the innocent from the guilty, the debtor from the creditor, the real person from an impostor, or the voluntary participant from one who is forced, tricked, or manipulated into participating.

So far in this account, the concept of natural law theory is merely descriptive. As such, it does not tell us whether we ought to respect the natural order of the human world. One might conceivably accept its descriptive aspects yet maintain that we ought to have confusion, disorder, or chaos. Or one might hold that we ought to replace natural law with an artificial order—for example, a *utopia*—that is defined in terms of non-objective, subjective, or conventional, perhaps imaginary, and, at any rate, artificial distinctions. However, as far as a normative stance is associated with natural law theory, it is usually that people ought to respect the natural order of the human world. We need not go here into the question of how to justify that stance in rational terms.[33] It is enough to note that it implies that people ought to respect one another *as the natural persons they are*.[34] It does not imply that they ought to respect one another only as the ideal types they would have

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[33]I have dealt with that question in my book (in Dutch) on "The fundamental principle of law," *Het fundamenteel rechtsbeginsel* (Antwerp: Kluwer-Rechtswetenschappen, 1982).

[34]Respecting a person is obviously not the same as esteeming that person. On the one hand, it is as easy to esteem a person (oneself or another) too much or too little as it is to demonstrate insufficient respect for a person. On the other, there is no way that we can respect a person (oneself or another) too much.

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to be if they were ever to be admitted in one's favourite utopia. Neither does it imply that they are respectable only as mere physical bodies without any praxeological identity.[35] What it does mean is that we ought to be just.

Justice—that is, respect for natural law or the natural order of the human world—requires that we respect the natural distinctions among ourselves in everything we do or say. It certainly requires that we do not initiate physical violence against others and their works or property. It also requires that we do not unilaterally appropriate any part of another's identity, words, or actions, nor attempt to pass off our own actions and words as if they were really another's. Indeed, the latter requirement appears to be more basic than the first. Unless there is a clear distinction between you and I—and also between "I do or say" and "You do or say"—the distinction between "what you do or say to me" and "what I do or say to you" cannot be made.

Within this approach—which is admittedly presented here only in the barest outline—the non-aggression rule takes its proper place in a theory of justice. A just legal code seeks to be as close to the requirements of justice as is humanly possible. It does so by making as good and clear and systematic a distinction between lawful and unlawful actions as the circumstances allow. On no account should it evade the challenge of justice merely because it would be simpler to operate if it did not have to bother about certain aspects of reality that are perhaps more elusive than others. Disrespect of another person is without doubt

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[35]The approaches of natural law theory and Austrian economics are, in my view, linked by having the same subject: the human person as such, i.e., the acting, thinking, speaking, purposeful human agent. In that respect, both are resolutely anti-reductionist. Austrians resist the temptation to reduce economic phenomena to a system of equations built up out of disembodied quasi-mathematical functions. Just so natural lawyers resist the temptation to reduce the phenomena of human co-existence to a set-up of rigidly defined artificial legal persons (i.e., roles, positions, and, indeed, functions in a scheme of social organisation). Both concentrate on human beings and what they do—especially what they do to one another.

Admittedly, Austrian economics and natural law theory occasionally use such abstract concepts as "the citizen," "the consumer," "the producer," "the criminal," "the banker," and so on. Nevertheless, they always are aware that real human beings drive the world. One, some, all, or none of those abstractions at one time or another may describe a natural or real person. However, that is so only because of the fact that only natural persons engage in politics, consume, produce, commit crimes, and handle money.

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easier to recognise in a physically invasive action than in a symbolic act such as misrepresenting oneself as another or another as oneself, but that does not mean that there is no injustice in the latter type of act.

I am quite sure that the natural law approach does not sanction patents or many other kinds of so-called intellectual property. It would leave much of Kinsella's analysis intact, but it would certainly anchor it in a solid foundation. A trademark pirate fails to respect at least one other person. Trademark piracy is unlawful even if it is not a physical aggression against any person or his property, because it is an unauthorised use or displacement of another's personal identity and integrity. It is unlawful and should be illegal to misrepresent oneself as another person (except in lawful self-defence against an aggressor), regardless of how many other persons are fooled by the pirate's attempt to sow confusion. In my view, it is lawful for the victim of such identity piracy to use any means it takes (including violence if that turns out to be necessary) to stop others from using counterfeit marks of his identity.

Likewise, the natural law approach does not destroy Block's theory of blackmail, but it does provide a useful analytical tool for making relevant distinctions. Surely, to say that most cases of blackmail are legitimate does not logically commit one to say that falsely accusing a person of a crime is legitimate. A blackmailer need not be confusing the law, but those who threaten others with libel or slander most certainly threaten to sow confusion in the human world. They do so without having the excuse of acting in self-defence or even in ignorance.

There is a distinction between information that is lawfully acquired and information that is unlawfully acquired. The blackmailer to whose defence Block may come legitimately is one who lawfully has acquired damaging information about another and offers that person the opportunity to contain the information at a price. Damaging information that has been acquired unlawfully is an altogether different case. Libel and slander, which do not rely on information no matter how it was acquired but on the misrepresentation of lies as information, are even more different. Using information that has been lawfully acquired does not violate anyone's rights, whether the information is damaging or not. It is no instance of a failure to respect others. Using information that has been acquired unlawfully presupposes a rights violation, again whether the information is damaging or not. It does imply a failure to respect at least one other person. However, the fabrication and telling of lies about a person *is* a violation of a person's identity and

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integrity—a failure to respect him as who and what he is. It is so even if the fabrication of lies as such is not a physical invasion of any person or his tangible property. It is for the person about whom lies are told to decide whether to stop the liar in his tracks or not. It is immaterial whether the lies are damaging or beneficial to him. (Throwing mud or gold at a person is unlawful, but it is up to that person to decide whether to seek to stop the thrower from continuing his activity.)

Personal identity and integrity are the presuppositions of every personal right. They are part of every natural right of every natural person. Respect for persons implies respect for their identity and integrity as persons as much as it implies respect for their tangible property.[36] Does the requirement that we respect one another as the natural persons we are restrict our freedom? Is it a cause or inducement of injustice? I believe that those who answer such questions affirmatively assume a burden of proof that soon will leave them breathless. Libertarianism, as I understand and cherish it, should found its theories of legality on the natural law requirement of respect for persons. It should not be satisfied with its physicalist shadow—what remains of it after we have reduced persons to tangible property and praxeological relations among persons to physical relations among behavioural units. The primary philosophical objective of libertarianism is to restore natural persons to their rightful place in our understanding of, and thinking about, the human world. That objective implies a sustained attack on the rampant reductionism and the endless arrays of fictions, abstractions and arid formalisms that characterise so much of social, economic and legal

[36]There are, of course, other aspects of the respect for persons that I have not discussed. Throwing rocks or shooting a gun at a person while making sure to miss him by an inch is unlawful. It is a clear indication of a failure to respect him as a person. Accordingly, in my view, it may be stopped without first having to inquire whether the "rules of the house" (or the street) where the throwing or the shooting takes place explicitly forbid such behaviour. I can hardly imagine that a libertarian judge would dismiss a case brought by a victim of such pestering, harassment, or intimidation with the remark that the defendant has the legal right to do anything short of physically invading another's body or property. It is only when the place where the incident took place has a rule that explicitly allows throwing rocks or similar nuisances that the victim should acquiesce. The harassment alluded to in this note could easily escalate into mob rule (ochlocracy) which would be a serious impediment to freedom even if, miraculously, it always stopped at the point beyond which it would become actual invasive violence. Nobody looks forward to yet another world where skillfully managed terror tactics enjoy legal protection.

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science today. However, we should not overshoot our mark in the endeavour to prove the tautology that a world without violence is a world without violence. Unless my comments in this paper have been completely misguided, I think I have shown that restricting libertarianism to the enforcement of the non-aggression rule still leaves us with a world where freedom and justice do not mix.

Unless we want libertarianism to be another revolt against nature, we should consider that it is supposed to be about justice and freedom for real human beings. It is not about the installation of a mechanical rule that offers a golden opportunity for any scoundrel that knows "how to play the system." Of course, there is a risk that a defence of one person's freedom impinges upon the freedom of another. The natural order of the human world is not always as clearly detectable as we would like, and some people invest an awful lot of effort, money and time in obfuscating it as much as possible. However, to deal with that risk, we should go back to first principles. John Locke, not a philosopher for whom Block and Kinsella could have no sympathy, said it well: "For by the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserv'd, the safety of the Innocent is to be preferred."[37] As for me, I share Locke's concern for the innocent much more than Block's concern for the liberty of rogues to do whatever they can get away with, short of physically violating another person or his property.

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